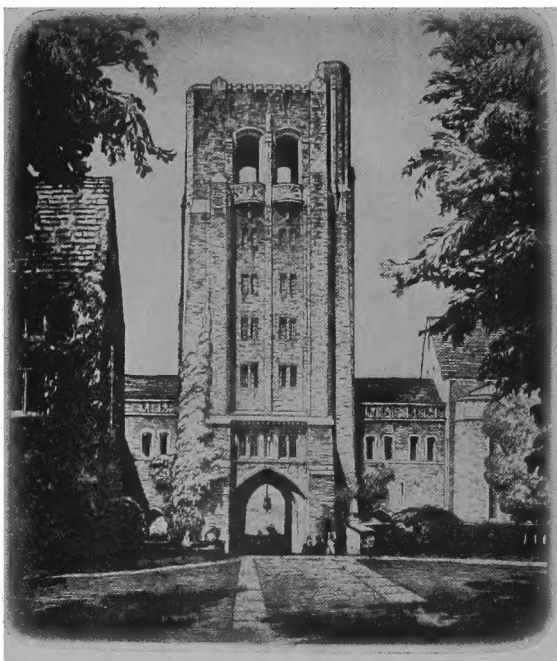


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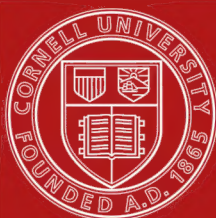
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COMPANY LAW

COMMENTARIES

ON THE LAW OF

PUBLIC CORPORATIONS

INCLUDING

MUNICIPAL CORPORATIONS

AND

POLITICAL OR GOVERNMENTAL CORPORATIONS
OF EVERY CLASS.

BY

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COMMENTARIES

ON THE LAW OF

PUBLIC CORPORATIONS.

PUBLIC CORPORATIONS.

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(a) POWER TO INCUR INDEBTEDNESS.

§ 776. **Manner of contracting.**— Unless prohibited by positive law a municipal corporation may do all things fairly within the scope of the powers conferred to accomplish the purposes for which it was created. Only general powers can be conferred upon such corporations, and from that source must be inferred all necessary power to render practicable that which is conferred by the general terms employed. Power to provide for the expense attendant upon the maintenance of municipal government is necessary to preserve its existence.¹ A county can be bound on a contract made by its board of supervisors only when they were acting in conformity with the law in respect to its execution.² Contracts for repairs of county bridges, when such repairs do not amount to a substantial reconstruction of the bridge, may be let by the county court privately; and modifications in the plans of a bridge in the course of construction involving labor and material in excess of that provided for in the original contract may be let in like manner so long as the same is done in good faith, and not with the intention to supersede the original contract to construct the bridge with another one not publicly let or one that shall have that effect.³ County commissioners contracted in writing to pay plaintiff the actual cost of constructing a bridge upon a highway in the county. A majority of the justices of the county, not then in session, executed a writing ratifying the contract, and afterwards, at a regular joint meeting of the commissioners and justices, a quorum of the latter voted in ratification of the contract. It was held that as the statute relating to bridges provided that where the cost of a bridge exceeded \$500 the commissioners could order its construction only with the concurrence of a majority of the justices of the peace, the approval of the contract by a majority of the justices sitting as an organized body was sufficient.⁴ As the Louisiana statute provides that

¹ *Law v. People* (1877), 87 Ill. 385, holding that a municipal corporation has no authority to levy a tax to provide a fund with which to entertain official visitors to the municipality, as such a tax would not be for any necessary or corporate purpose.

² *Wheeler v. Wayne County*, 31 Ill. App. 299, affirmed in 132 Ill. 599; s. c., 24 N. E. Rep. 625.

³ *Pacific Bridge Co. v. Clackamas County*, 45 Fed. Rep. 217.

⁴ *Cleveland Cotton Mills v. Comm'rs of Cleveland County* (1891), 108 N. C.

the money must be accessible in the treasury before any warrant can issue against it, the police jury of a parish in that State cannot, in the absence of express legislative authority, enter into a contract for the construction of bridges to be paid for in promissory notes of the parish, payable in each year for a stated number of years out of a fund created by an appropriation of a part of the annual ten-mill tax of the parish.¹ A county has been held liable for money borrowed by its board of supervisors to replace a highway bridge over a stream which had been washed away by a flood.²

§ 777. **Construction of statutory provisions.**—The provision in the constitution of Kentucky that no act of the legislature authorizing the creation of any debt on behalf of the commonwealth shall become effective until it has been submitted to the people at a *general* election does not include debts created by a county or other municipal division of the State.³ The statutes of Illinois which authorize each county “to make all contracts and do all other acts necessary to the exercise of its corporate powers,” and “to manage the county funds and county business, except as otherwise specifically provided,” do not authorize counties to issue bonds without a vote of the people.⁴ The provision of a city charter that the trustees shall not incur any debt or borrow money for the use of the city, without having the concurrence of five-eighths of the taxable property owners, to be ascertained by a petition for that purpose, does not prohibit the incurring of debt for ordinary expenditures, but does forbid the incurring of a permanent debt, or an extraordinary expenditure of public money.⁵ A provision in its charter that a city shall not borrow more than \$50,000 for general purposes does not limit

678; s. c., 13 S. E. Rep. 271 (two judges dissenting).

¹ Snelling v. Joffrion, 42 La. Ann. 886; s. c., 8 So. Rep. 609.

² Maneval v. Jackson Tp., 9 Pa. Co. Ct. Rep. 28, the court holding that the right to borrow money for that purpose resulted to the board from the duty imposed on them to repair highways and build bridges when

necessary, under penalty of fine and imprisonment for failure to discharge such duty.

³ Walton v. Riley, 85 Ky. 413; s. c., 3 S. W. Rep. 605.

⁴ Locke v. Davison (1884), 111 Ill. 19. See, also, County of Hardin v. McFarlan, 82 Ill. 138; Cook County v. McCrea, 93 Ill. 236.

⁵ Ivinston v. Hance, 1 Wy. Ter. 275.

its power to go into debt for a greater sum for special improvements.¹ When a county in Nebraska desires to build a court-house, if it has not on hand a sufficient fund which can be applied in payment for such a purpose without doing violence to principle, the proposition must be submitted to the qualified voters of the county to get permission to incur such extraordinary indebtedness and for authority to resort to the extraordinary remedy provided by statute for raising the necessary and appropriate funds. Without such authority the commissioners cannot lawfully contract for the erection of such a building, and without such action on the part of the electors of the county the commissioners are powerless to proceed, however much the building may be needed.² Where the commissioners of a county specially authorized by legislative enactment to erect a court-house by contract or otherwise make a binding and valid contract for that purpose, such a contract cannot be annulled by vote of the people of the county.³ Where the county court of a county is invested with jurisdiction and power to order the erection and repair of bridges, and is charged with the duty of taking care of and maintaining the poor, a limitation in the general revenue laws as to the rate or amount of taxes which may be annually levied for bridges and paupers does not measure the legal power of the county court to bind the county by contracts otherwise binding for those purposes.⁴ An Iowa statute provided that it should be competent for any city authorized by the statute to levy a tax to pay for the paving of street and alley intersections "to anticipate the collection thereof by borrowing money, and pledging such tax, whether levied or not, for the payment of the money so borrowed." Under this statute there is no limitation upon the city as to the amount of work of the kind mentioned therein which it may have done in a single year, except the limitation of the constitution as to the

¹ *Hitchcock v. Galveston*, 96 U. S. 341.

² *Brown v. County Comm'rs*, 2 McCrary, 469, holding that in the absence of authority to make such an appropriation there was no rightful authority for issuing county war-

rants; consequently they were void and no recovery could be had on them.

³ *Cook v. Comm'rs*, 6 McLean, 618.

⁴ *Kinsey v. Pulaski County*, 2 Dill. 253.

indebtedness it may contract; nor does it limit the city in making the loan provided for to the amount of tax which would accrue under a levy for a single year. But the city is empowered to pledge the tax to any extent necessary to enable it to meet such indebtedness as it may lawfully incur in a single year and to levy a tax for successive years for that purpose.¹ The Ohio statute which provides that a city shall not make a contract involving the expenditure of money unless the money is certified to be in the treasury, unappropriated, though general in its terms, has been construed to prohibit cities and towns from incurring debts to subserve their ordinary purposes, and not to apply to a contract made by a city for the lighting of the streets by an electric lighting company.² By statute in Illinois cities under special charters have power to levy an additional tax for the distinct objects named; and the "sewerage fund tax," and the "water fund tax," provided for by that statute are in addition to the rate of taxation theretofore authorized by law.³ It has been held that under the Wisconsin statute of 1885, providing for county aid to towns in building bridges, the cost of which exceeds one-fourth of one per cent. of all taxable property of the town "according to the last equalized valuation," the valuation of 1885 controlled as to bridges authorized at the annual town meeting of 1886, although the county was not called on for aid until after the valuation of the latter year.⁴ As it is the duty of the county court in Missouri to make an appropriation to pay for work done on a bridge when it orders the commissioner to enter into the contract, it will be presumed that the court performs its duty until the contrary is proved.⁵

§ 778. Borrowing money.—A power to borrow money does not belong to a municipal corporation as an incident of its creation.⁶ Judge Dillon declares a strong inclination, "where the legislative will is wholly silent, . . . to deny the existence of a general implied or incidental power to bor-

¹ Coggeshall v. City of Des Moines (1889), 78 Iowa, 235.

² Clark v. Columbus (Ohio), 23 Wkly. L. Bul. 289.

³ Thatcher v. Chicago &c. Ry. Co., 120 Ill. 560; s. c., 11 N. E. Rep. 853.

⁴ State v. Pierce County, 71 Wis. 827; 37 N. W. Rep. 233.

⁵ Bryson v. Johnson Co., 100 Mo. 76; s. c., 13 S. W. Rep. 239.

⁶ Mayor v. Ray (1873), 19 Wall. 468.

row money." But he admits that down to the time of giving that conclusion a majority of the express adjudications on the subject favor the contrary opinion.¹ The majority of the Supreme Court of the United States have spoken to this effect:—"To be possessed, it [the power to borrow money] must be conferred by legislation, either express or implied. It does not belong as a mere matter of course to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidence of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation."² A legislature may confer upon a city power to borrow money for any public purpose whenever it may be deemed expedient so to do.³ A municipal corporation being but a subordinate branch of the government, it represents the State sovereignty in a limited district and for specified purposes,—local government and police,—and the power of taxation is granted for carrying out these purposes.⁴ A clause in a city charter providing that it "may do all other acts as natural persons" must be restrained to such other acts as are authorized by its charter

¹ 1 Dillon on Munic. Corp., § 117. See, also, *Robertson v. Breedlove*, 61 Tex. 316; *Richmond v. McGirr*, 78 Ind. 192. In *Bank v. Chillicothe* (1836), 7 Ohio (part II), 31, the Ohio Supreme Court held that in carrying out the express powers or in effecting any legitimate municipal object, the corporation possessed the *incidental* or *implied* right to borrow money. In *Mills v. Gleason* (1860), 11 Wis. 470; s. c., 8 Am. L. Reg. 692; *State v. Madison*, 7 Wis. 698; *Clark v. Janesville*, 10 Wis. 136, the Wisconsin Supreme Court affirmed the implied authority of such corporations as incidental to the execution of the gen-

eral powers granted by charter, and, in the absence of a special restriction, to borrow money and issue bonds therefor, where it appeared that the proceeds thereof went into the treasury of the corporation and were spent by it.

² *Mayor &c. v. Ray* (1873), 19 Wall. 468, 475.

³ *Mitchell v. Burlington*, 4 Wall. 271; *Larned v. Burlington*, 4 Wall. 276, which held the building of a plank-road to be such a public purpose.

⁴ *Chisholm v. City of Montgomery*, 2 Woods, 594; *United States v. New Orleans*, 98 U. S. 393.

or the statutes of the State applicable to the city, if any, and cannot be construed to remove all the limitations inseparable from corporate existence, and to confer upon the city authority to engage in business of a private nature or to make its powers commensurate with those of natural persons. It cannot, therefore, be construed to confer an express power to borrow money or issue commercial paper.¹

§ 779. The same subject continued.—The statutes of New York do not empower a municipal corporation, either expressly or by implication, to borrow money to defray the expenses of a suit instituted in its behalf.² A section of the charter of a city in Kentucky authorized the city to borrow money and to give or loan its credit in aid of any person or corporation, “for appropriate municipal objects.” Another section provided the condition upon which the city council might contract debts and liabilities in behalf of the city beyond the amount of revenue of the current fiscal year, and payable within or beyond such year, and required the ordinance authorizing the creation of such liability to be approved by popular vote, and to provide for levying and collecting the annual tax to pay principal and interest. By an act of the legislature certain persons were designated to prepare new assessment and revenue laws for the city, “regulating in all respects the assessment of property and choses in action, the duties of all assessing and collecting officers, the time, term and manner of the payment of taxes,” etc. Their labors resulted in an act which was a revision of the mode of collecting and imposing taxes to meet the ordinary annual expenditures of the city government, but which made no allusion to the right of the city council to make extraordinary appropriations other than for revenue proper, when sanctioned by a vote of the people. It was held that the power conferred by the above quoted provisions of the charter still existed, and might be exercised for proper munic-

¹ *Gause v. City of Clarksville*, 5 Dill. 170; approved in *Merrill v. Monticello*, 138 U. S. 673.

² *Wells v. Town of Salina*, 119 N. Y. 280; s. c., 23 N. E. Rep. 870, the Court of Appeals holding the statutes authorizing municipal corporations

to “raise” money for prosecuting and defending such suits as they may deem necessary, and for other municipal purposes, to mean that money is to be raised by taxation, and not by borrowing.

ipal purposes.¹ The issue of any change bills or promises in the similitude of currency is prohibited to persons or corporations by a Georgia statute, and no recovery can be had on such change bills issued by a city.² In the absence of express legislative authority a municipal corporation has no power to utter unconditional obligations to pay money which will have the attributes of negotiable instruments in the hands of a *bona fide* purchaser before maturity.³ In Texas the counties, in the absence of legislative authority, have no power to issue negotiable securities.⁴ In the absence of any special statutory authority a city has no right to issue certificates of indebtedness in negotiable form, even in payment for property which it has authority to buy.⁵

§ 780. Employment of attorneys.—In California a board of county commissioners have authority to employ counsel other than the district attorney to collect the money due to the county by the State for the support of indigent persons, and the choice of such counsel is a matter within their discretion and cannot be reviewed.⁶ The county board is not deprived of power to authorize any competent attorney to begin and carry on suits to recover delinquent taxes by the Illinois statute which provides that the State's attorney shall prosecute all actions for debts and revenues due the State or county, and that if he is incapacitated the court in which the suit is pending may appoint some competent attorney to take his place.⁷ A county board of supervisors, under the Illinois statute giving them power to "do all other acts in relation to the concerns of the county," has power to employ an attorney to defeat collection of a tax to pay interest on railroad bonds claimed to be illegal and to procure a final adjudication as to

¹ *Frantz v. Jacob* (Ky.), 11 S. W. Rep. 654.

² *Cothran v. City of Rome*, 77 Ga. 582.

³ *Brenham v. German-American Bank* (1892), 144 U. S. 173; *Neugass v. City of New Orleans*, 42 La. Ann. 163; s. c., 7 So. Rep. 565.

⁴ *Francis v. Howard Co.*, 50 Fed. Rep. 44; following *Nolan County v.*

State (Tex.), 17 S. W. Rep. 826; and *Robertson v. Breedlove*, 61 Tex. 316.

⁵ *Bangor Savings Bank v. City of Stillwater*, 46 Fed. Rep. 899.

⁶ *Lassen County v. Shinn*, 88 Cal. 510; s. c., 26 Pac. Rep. 365.

⁷ *Ottawa Gaslight Co. v. People* (Ill.), 27 N. E. Rep. 924, following *Sterling Gas Co. v. Higby*, 134 Ill. 557; s. c., 25 N. E. Rep. 660.

the validity of such bonds.¹ A county board has the right, by virtue of its general powers to manage the affairs of the county, to employ counsel and to cause proceedings to be instituted in the name of the county without the consent of the county attorney and regardless of his willingness or ability to appear for the county.² But a board of county commissioners has not the power to bind its successors by employing attorneys to act for a period beyond the time when the board will by operation of law have to be reorganized.³

§ 781. Contracts for construction of county buildings.— Though county commissioners may have exceeded their authority in awarding a contract for the building of a court-house, tax-payers of the county have no such special interest distinct from that of the public as will entitle them to maintain an action to restrain the issuance of warrants in payment for work done in building the court-house.⁴ It has been held that an objection that changes in the specifications for heating a court-house in an action for the cost thereof, under the provisions of the Indiana statute which requires plans and specifications for the construction of public buildings to be prepared and filed, was not well taken in the absence of proof that the changes respecting the steam-heating apparatus were other than of such minor importance as were necessary and apparent in the progress of the work.⁵ County officers who are

¹ *Franklin County v. Layman*, 34 Ill. App. 600.

² *Taylor County v. Standley* (1890), 79 Iowa, 666. See, also, *Tatlock v. Louisa County*, 46 Iowa, 138; *Jordan v. Osceola County*, 59 Iowa, 389.

³ *Board of Comm'rs v. Taylor* (1889), 123 Ind. 148.

⁴ *Wood v. Bangs*, 1 Dak. 179; s. c., 46 N. W. Rep. 586. Nor have they such common interest that they may join in the action. The Supreme Court held that the relief should also be denied because the plaintiff had a complete remedy at law under the Dakota statute which authorizes the commissioners to erect court-houses, but allows an appeal to the district

court from their decision on any matter properly before them.

⁵ *Board of Comm'rs v. Cincinnati Steam Heating Co. (Ind.)*, 27 N. E. Rep. 612. See, also, *Board of Comm'rs v. Motherwell Iron & Steel Co.* (1889), 123 Ind. 364, holding that where the board of commissioners of a county, engaged in building a court-house, appointed an architect and intrusted to him the full supervision of its construction, and such architect ordered a change in the iron work to be made by a subcontractor, which caused an increase in the expense, and after the work was completed the commissioners accepted the building, the county was liable for such extra

authorized by law to contract for the building of a courthouse cannot delegate such authority to a private individual.¹

§ 782. Support of the poor.—The statute of Indiana makes it the duty of the county commissioners to employ physicians for the poor, but authorizes the overseers of the poor in townships not otherwise provided for to employ such medical or surgical services as paupers within their jurisdiction may require. Under that statute the overseer of the poor may, at the county's expense, employ a physician to treat a pauper in urgent need of medical aid where the regular county physician refuses to take the case.² But he has no right to employ a physician where the county physician is willing to take the case, but is not requested to do so because in the judgment of the overseer he is incompetent.³ Those who accept employment from an overseer of the poor must, however, at their own risk inquire into his power to bind the county.⁴ Where provision for a physician is not made, the trustees of the township (who act as overseers of the poor) have, in Indiana, statutory authority to employ "such medical services as paupers within their jurisdiction may require." It has been held that in an action against a county on account of such employment by a trustee, the burden was on plaintiff to show a necessity for employing a physician other than the one provided by

work, although there was no agreement as to the price of the same, and the contract was not in writing and attached to the original contract with the contractor as provided for in the original contract. It has also been held in Indiana that where a board of county commissioners let a contract for the construction of a county building, and the contractor abandoned the contract, the county commissioners had power to take charge of the work and complete the building without adopting new plans and specifications, or letting a new contract. *Board &c. v. Byrne*, 67 Ind. 21; *Brass Foundry v. Board &c.*, 115 Ind. 234; *Board &c. v. Hill*, 122 Ind. 215.

¹ *Russell v. Cage*, 66 Tex. 428; s. c., 1 S. W. Rep. 270.

² *Board of Comm'rs v. Lomax* (Ind., 1892), 31 N. E. Rep. 584; *Board &c. v. Jennings*, 104 Ind. 108; *Board &c. v. Boynton*, 30 Ind. 359; *Board &c. v. Hon*, 87 Ind. 356; *Board &c. v. Seaton*, 90 Ind. 158; *Comm'rs v. Holman*, 34 Ind. 256; *Comm'rs v. Board &c.*, 57 Ind. 15; *Board &c. v. Ritter*, 90 Ind. 362.

³ *Board of Comm'rs v. Lomax* (Ind., 1892), 31 N. E. Rep. 584.

⁴ *Board of Comm'rs v. Lomax* (Ind., 1892), 31 N. E. Rep. 584; *Robbins v. Board &c.*, 91 Ind. 537; *Washburn v. Board &c.*, 104 Ind. 321; s. c., 3 N. E. Rep. 757; *Morgan County v. Seaton*, 122 Ind. 521; s. c., 24 N. E. Rep. 213.

the county.¹ The county judge and justices are the sole judges of the need of a poor-house, and can purchase land therefor and make the necessary improvements under the Kentucky statutes.² A statute of New York provides that "the powers and duties heretofore conferred upon the supervisors of the respective towns of [one of the counties], so far as relates to the adjudications in relation to and the relief and support of the poor, are hereby conferred on the overseers of the poor of the respective towns of said county." The overseer of the poor gave orders in payment of certain services to a pauper, which the owner presented to the board of town auditors, who disallowed them as not being valid claims against the town. It was held that, as the statutes vest in the overseer the exclusive power to make such contracts for services, the determination of the board did not bind the owner.³ By the failure of a town in Massachusetts to choose directors of the alms-house, their duties were imposed on the overseers of the poor. The board of overseers consisted of three members, elected for three years, one member being elected at the town meeting in March of each year. In February 1888, the member next to retire having resigned, leaving a vacancy to be filled in the following March, the two remaining members contracted in writing for services of a superintendent and matron of the alms-house for one year from the 1st of April then next. It was held that they could not bind the town by such contract not to be entered upon until after the election by which another member would be added to the board and at which directors might be chosen.⁴

¹ Board of Comm'rs v. Osborn (Ind., 1892), 31 N. E. Rep. 541. The court said:—"The function of administering public charities is governmental, and township trustees are agents of the county for that purpose. This agency is created and defined by law, and consequently is of such a character that all are bound to take notice of its scope and limitations."

² Jones v. Pendleton County Court (Ky., 1892), 19 S. W. Rep. 740.

³ Christmas v. Phillips, 58 Hun, 282; s. c., 12 N. Y. Supl. 338.

⁴ Reed v. Lancaster, 152 Mass. 500;

s. c., 25 N. E. Rep. 974, further holding that there could be no ratification of the contract by the overseers after such election, acting not as a board but as individuals, especially as no knowledge of the matter by the incoming member was shown except by his testimony that he knew there was "some sort of a contract" and knew "something of its terms." See as to their being required to act together, May v. Railroad Comm'rs, 113 Mass. 161; Shea v. Milford, 145 Mass. 525; § 275, *supra*.

§ 783. **Taxation for school purposes.**— Boards of supervisors may levy a tax to pay teachers' warrants of a previous year, these constituting indebtedness of the county, if in so doing the limits of taxation for all purposes provided by law for counties having outstanding indebtedness is not exceeded.¹ Under the Mississippi statute which makes it the duty of the board of supervisors of each county to "levy upon the taxable property of such county a tax of three mills or more" for school purposes, the levy does not include property in a town in the county which is a separate school district. As to such separate district the levy is to be made by the town authorities.² Where a levy of a tax for school purposes is properly made and within the statutory limit, it is no ground for enjoining its collection that the levy was unnecessarily large, or that the directors proposed to divert part of the money raised to another purpose.³ It has been held that allegations in a bill to enjoin the collection of a school tax that the determination to levy was not made by the school directors at a regular or special meeting, nor in their corporate capacity, but as individuals, did not charge that the directors acted in the matter without meeting together.⁴ The Supreme Court of Georgia held that a majority of the complainants in an action for injunction having voted in favor of the approval of a local school law, and all of them having acquiesced in the result of the election until after a school was established and put into operation, an interlocutory injunction restraining the collection of a tax authorized by the local law and levied for supporting the public school system provided for by the local

¹ *Cowart v. Foxworth* (1889), 67 Miss. 323, distinguishing *Foote v. Brown*, 60 Miss. 155, in which it was held that a tax collector could not be compelled to receive in payment of the tax for school purposes in the year 1882 a teacher's warrant issued in a previous year, and that a county treasurer could not be required to pay such a warrant out of money collected for the year 1882, unless there was in his hands a surplus of such fund beyond what was required for schools for that year. The court pointed out that it was not suggested

or decided therein that the supervisors could not levy a tax to pay such a deficit for a previous year.

² *Bourdeaux v. Meridan Land & Industrial Co.* (1889), 67 Miss. 304. In the matter of taxation the word "county" is to be restricted to property outside of the town in order to effectuate the purpose of the legislation and to carry out the scheme of separate school districts.

³ *Lawrence v. Trainer* (Ill.), 27 N. E. Rep. 197.

⁴ *Lawrence v. Trainer* (Ill.), 27 N. E. Rep. 197.

law was properly denied.¹ Under the school law of Kentucky the trustees of a common school district may order the collection of a tax to build or repair a school-house without submitting the question to the voters of the district; but it is a condition precedent to the right to order the tax that it is necessary to build a school-house, or that the county superintendent has condemned the school-house and that it needs repairing.² A demurrer to a complaint which prayed simply for a money judgment against a newly created town for the amount of taxes for the support of the high school alleged to be due and unpaid as its proportionate share was held by the Supreme Court of Wisconsin to have been properly sustained; also that it was not a case calling for present damages, but rather further enforcement of an official duty, which could only be compelled by a *mandamus* to the officers of the town ordering a levy and collection of its share of the taxes.³

§ 784. **The same subject continued.**—The officers of a city may be invested by the legislature with power to levy and collect taxes for the support of common schools.⁴ And the adoption of the general incorporation law by a city, and the passage of a general school law, do not modify or impair any former special laws authorizing such city as a public agency to levy and collect taxes for school purposes.⁵

¹ *Irvin v. Gregory*, 86 Ga. 605; s. c., 13 S. E. Rep. 120.

² *Macklin v. Trustees* (1889), 88 Ky. 592. It was further held that the legislature has the constitutional power to authorize the trustees of a school district to order the collection of a tax, not to exceed a certain sum, without submitting the question to a popular vote; and while the legislature must always prescribe the rules under which the taxation is imposed and cannot refer the power to another body, yet having prescribed the rule it need not fix the exact sum to be raised or the particulars of the expenditure. See, also, *Talbot v. Dent*, 9 B. Mon. 526.

³ *Joint Free High School Dist. v. Town of Green Grove*, 77 Wis. 532; s. c., 46 N. W. Rep. 895.

⁴ *Fuller v. Heath* (1878), 89 Ill. 296. Such laws, wherever found, are a part of the school laws of the State and not strictly a part of the charter or law of the city. In such case the city officers are mere agencies of the public to carry into effect the objects and purposes of the general school system.

⁵ *Fuller v. Heath* (1878), 89 Ill. 296; *Speight v. People* (1877), 87 Ill. 600, in which case it was held that there was no limitation in the constitution of Illinois as to the agencies the State shall adopt in providing

§ 785. The same subject continued — Validity of resolutions.— The general school law of Maryland provides that when the State school fund is insufficient in any county the county commissioners shall, on the demand of the school board, levy not exceeding ten cents on the \$100 for school purposes; and a special local statute provides that in Anne Arundel county there may be an additional levy not exceeding twenty cents on the \$100 for school purposes, which shall constitute a separate fund, not to be used for other purposes, both to be paid by the treasurer to the school commissioners; and that the treasurer's commissions shall be separately levied. County commissioners cannot deduct under these statutes from the school levy, unconditionally made, either the amount of the treasurer's commissions or discounts for prompt payment of taxes, but must pay over the gross levy to the school commissioners.¹ Under the statute of Illinois which requires the official acts of each school board to be recorded by its clerk, a tax levy which has been duly signed by the directors and filed with the township treasurer has been held not to be invalidated by the failure to record the action of the directors in making the levy.² A special meeting of a school district can vote to raise money to build a school-house, although a similar proposition had been rejected at a previous special meeting held in the same year.³ A resolution to raise

this system of free schools, and that the General Assembly had full power to select or prescribe the agencies by which school taxes shall be levied, collected, held and disbursed for school purposes, and that all laws, whether in city charters or elsewhere, designed to affect free schools, may be regarded as *school laws* — as part of the law intended to provide a system of free schools; and that the provision as to the power of passing special laws related merely to the *management* of common schools, that is, to the conduct of common schools in imparting instruction, and did not relate to the matter of providing the necessary funds for their support. See, also, *Covington v. East St. Louis*,

78 Ill. 548; *Sheridan v. Colvin*, 78 Ill. 243. As to public education being a corporate purpose, *Vanover v. Justices*, 27 Ga. 354; *Common Schools v. Comm'rs of Alleghany Co.*, 20 Md. 449; *Burr v. City of Carbondale*, 76 Ill. 455; *Taylor v. Thompson*, 42 Ill. 9.

¹ *Board of County School Comm'rs v. Gantt*, 73 Md. 521; s. c., 21 Atl. Rep. 548.

² *Lawrence v. Trainer* (Ill.), 27 N. E. Rep. 197. The reason for the rule was that the officers charged with carrying the levy forward act upon the certificate of levy and not upon the record of the board.

³ *State v. Clark* (1890), 52 N. J. Law, 291. The act of 1888 (Pamphl. L. N. J. 93, § 1), amending the act of

a single sum for building and furnishing a school-house is not bad for uncertainty because the amount to be used for building and the amount for furnishing are not separately stated.¹ A resolution to raise a sum of money to build a school-house was followed by a resolution that several bonds payable in successive years should be issued. In such a case it was held erroneous to issue a certificate to levy the whole amount in one year.² And a resolution to sell an old school-house, passed at the same meeting that it was resolved to raise money to build a new house, was held to be illegal.³

§ 786. Levy of taxes.—A *mandamus* will not lie to compel the levy of an unauthorized tax.⁴ But where a statute provides that the board of supervisors “may, if deemed advisable,” levy a special tax to pay a judgment rendered against

1880 (Pamphl. L. 225, § 1), leaves in force that portion of general school act (Rev. 1085), section 86, requiring the vote of a majority of the legal voters present upon any proposition to raise money for building a school-house. The act of 1885 requires the presence of a majority of the taxable voters of the district only when any proposition for the condemnation of land is presented. See, also, *State v. Lewis*, 35 N. J. Law, 377; *Point Pleasant Land Co. v. Trustees*, 47 N. J. Law, 235.

¹*State v. Clark* (1890), 52 N. J. Law, 291. The court distinguished *State v. Sullivan*, 36 N. J. Law, 89.

²*State v. Clark* (1890), 52 N. J. Law, 291, the reason being that the bonds were to be paid as they successively matured by warrants issued in accordance with the general school act, section 89 (Rev. N. J. 1086).

³*State v. Clark* (1890), 52 N. J. Law, 291, for the reason that no notice was given that the sale of the old school-house would be a subject for consideration at the meeting.

⁴*Supervisors v. United States* (1873), 18 Wall. 71, 84, in which *mandamus*

was prayed for to compel the supervisors of an Iowa county to levy a tax exceeding four mills on the dollar to which they were limited by the law for ordinary expenses of the county, to pay a judgment on county warrants. The court said:—“None of them were issued in pursuance of a popular vote or for any extraordinary expenditure. They were such instruments as the legislature contemplated might be employed in conducting the current and usual business of the county. The act which empowers the county board to levy a tax for ordinary county revenue speaks of them and evidently intends that they shall be satisfied either from the proceeds of that tax or by their being received in payment thereof. They are simply a means of anticipating ordinary revenue.” Following *Clark v. City of Davenport*, 14 Iowa, 494, holding that the code of Iowa conferred no independent power to levy a specific tax in order to pay a judgment recovered against a municipal corporation, and that when the power was not otherwise given it was not given by the code.

the county, these words have been construed as peremptory instead of permissive merely and to require the levy of a tax to pay such judgment.¹ Where a county has no power to levy a special tax to pay its warrants, and under its general power of taxation can only levy a tax of five mills on the dollar, payable in cash or county warrants, which tax is entirely used in paying its ordinary current yearly expenses, a *mandamus* will not lie to compel the county to levy this five mills general tax, to compel its collection in cash, and its application fully or in part to the payment of county warrants instead of to ordinary expenses.² And a power in the charter of a municipal corporation to levy a limited general tax for ordinary purposes does not abrogate its power and duty to levy special taxes in proper cases for special purposes.³ Where a city has power to levy a tax of one per cent. on all property within its limits, and besides, with the consent of its legal voters expressed at any general or special election, an unlimited power of taxation, a *mandamus* will lie to compel the municipal officers to call an election and require the voters to vote the tax necessary to pay a judgment against it.⁴ Where there is no legislative limit upon the amount of money that may be raised by taxation in a city, and ample power is given to levy and collect all that may be necessary to discharge the corporate obligations, the power to contract a debt by issuing municipal stock carries with it, by necessary implication, the power to provide for the payment thereof by the levy and collection of a tax.⁵

§ 787. Contracts for water supply and lighting.—If a charter provides that the common council of a city shall have no power “to contract debts, incur liabilities, or make expenditures in any one year which should exceed the revenue

¹ *Supervisors v. United States*, 4 Wall. 435.

² *United States v. Miller County*, 4 Dill. 233.

³ *Britton v. Platte City*, 2 Dill. 1.

⁴ *United States v. City of Sterling*, 2 Biss. 410. The reason given for this rule was that if a tax of one per cent. was not sufficient to raise the

amount necessary to pay the judgment, it was the duty of the city authorities to call an election for that purpose. The fact that the tax of one per cent. was exhausted in paying its current expenses was no excuse for the failure to take a vote.

⁵ *Ex parte Parsons*, 1 Hughes, 282.

for the same year, unless authorized so to do by a majority vote of the tax-payers," a contract entered into without submission to the tax-payers for a supply of water for a term of years, at a cost per year which would not exceed the authorized levy of past years, but the aggregate of which would exceed any such percentage as could be collected in any one year, is void.¹ A provision in a city charter limiting the borrowing of money is rendered nugatory by a general act empowering all cities to construct water-works without limit as to cost, and to borrow money for the purpose on their bonds.²

§ 788. School boards and directors.— In Missouri a board of public school directors has no power to rent buildings or rooms separate from the district school-house, and to employ teachers for a supplemental school therein, without authority from the voters of the district.³ Under the statutes of Illinois, one of which provides that if judgment shall be obtained against school directors it shall be competent for the court in

¹ *Niles Water-Works v. Niles*, 59 Mich. 311; s. c., 11 Am. & Eng. Corp. Cas. 299. As to the lack of power to enter into a contract for a supply of water for a fixed annual sum where no steps are taken to raise by taxation the necessary moneys to meet the liability as it accrues where the indebtedness of a city has reached the prescribed limit, see *State v. Atlantic City*, 49 N. J. Law, 558; s. c., 17 Am. & Eng. Corp. Cas. 592; *Prince v. Quincy*, 105 Ill. 138; s. c., 2 Am. & Eng. Corp. Cas. 66; *Davenport v. Kleinschmidt*, 6 Mont. 502; s. c., 16 Am. & Eng. Corp. Cas. 501; *East St. Louis v. Flannigan*, 26 Ill. App. 449; *Salem Water Co. v. Salem*, 5 Oregon, 30. In *Smith v. Dedham*, 144 Mass. 177, it was held under a Massachusetts statute which enacts that towns shall not incur debt except in the manner prescribed by the act that a town was not restricted in its power to contract for a supply of water, the

consideration therefor to be paid monthly. The court said it was in effect a cash transaction where the payments were made *pari passu* with the incurring of liability. See, also, *Valparaiso v. Gardner*, 97 Ind. 1. In *East St. Louis v. East St. Louis Gas-light Co.*, 98 Ill. 415, it was held that where a contract for lighting the streets of a city for a term of thirty years has been made and the agreed price therefor to be paid monthly, which sum for any one year was not in excess of the constitutional limitation of indebtedness, but taken for the whole term was in excess of the debt the city was authorized to incur, the contract was not within the inhibition, but was legal and binding, there being created no present indebtedness for the whole sum, but only as the gas should be supplied from month to month.

² *Dutton v. Aurora*, 114 Ill. 138.

³ *Black v. Cornell*, 30 Mo. App. 641.

which it was rendered or some other court to issue a writ commanding its payment and to enforce obedience to the writ by *mandamus*, and another that funds in the hands of the treasurer of a district shall be paid out on the order of the directors of the district, *mandamus* will not lie to compel a treasurer to pay a judgment against the district from funds collected under a special levy for that purpose, in the absence of an order by the school directors or a court of competent jurisdiction for the payment of such funds.¹ Where a school district at its annual meeting votes a certain sum to a moderator for money expended by him in behalf of the district, and an order is accordingly drawn by the director and countersigned by the moderator, the district should not be put to the costs of a suit on the order by reason of the refusal of the assessor to pay it, as *mandamus* will lie against him for the performance of his duty.² Where a school board has examined and approved the accounts and vouchers of its treasurer and granted a discharge, the discharge is conclusive unless procured by fraud; and in an action by the successor of such board to rescind the settlement and discharge, the burden is on the plaintiff to show fraud.³ Under Kansas statutes which provide that the director of each school district shall sign all orders drawn by the clerk upon the treasurer of the district for moneys collected or received by him, and that the treasurer of each district shall pay out on the order of the clerk signed by the director all public moneys, etc., it is the imperative duty of the director to sign orders drawn by the clerk upon the treasurer when presented to him for signature.⁴

§ 789. **Erection of school-houses.**—The electors of a district township in voting a tax for the purchase of a site and the construction of a school-house are not required by the code of Iowa, which authorizes them “to vote a tax,” to vote by ballot, but they may express their views upon pending questions in any recognized manner in the absence of specific

¹ *Watts v. McLean*, 28 Ill. App. 537. wood, 42 La. Ann. 468; s. c., 7 So.

² *Phillips v. School Dist.*, 79 Mich. Rep. 537.

170; s. c., 44 N. W. Rep. 429.

⁴ *Faulk v. McCartney*, 42 Kan. 695;

³ *Parish School Board v. Pack-* s. c., 22 Pac. Rep. 712.

requirements.¹ Under the Kentucky statutes providing that it shall be the duty of the county superintendent to condemn dilapidated school buildings, and of the trustees, when notified by the superintendent of the condemnation, to repair the old building or erect a new one, the superintendent and the trustees are the judges of the necessity of a new building and their action cannot be questioned by the tax-payers of the district.² In a case where a school board was authorized by a vote of the district to approve plans for and contract for the construction of a school-house, the cost of which was not to exceed \$5,000, and it let such contract for \$4,425, it was held that the board had the power thereafter, without further grant of authority, to make necessary changes in the plans of the building, provided the additional cost thereby incurred did not increase the whole cost beyond the amount limited by the vote.³ Where, after this contract for erection of a school-house was made by the board, the school district issued its order for \$5,000 and converted it into cash, as a fund out of which to pay the expense of erecting the building, but only \$4,075 was realized therefrom, it was held that the board had power to issue further orders to pay the amount due under the contract and for changes in the plans, provided the whole expenditure did not exceed \$5,000.⁴ The electors of a school district may at a regular meeting, in case of default of an assessor, authorize a settlement of the matter by providing that the assessor may pay a part in cash and the balance may be paid in township orders, guaranteed by a responsible party.⁵ School certificates of indebtedness, issued by the board of directors of the public schools of New Orleans for the years of 1874, 1875 and 1876, were held not to be debts of the city,

¹ *Seaman v. Baughman* (Iowa), 47 N. W. Rep. 1091. It was also held not to be necessary first to procure a site before voting a tax for the construction of a new school-house.

² *Trustees v. Jamison* (Ky.), 15 S. W. Rep. 1. It was further held that where the trustees are notified by the superintendent that a better house is required, and that the old one has been condemned, it is not necessary

that they see the order of condemnation before taking action.

³ *Edinburg-American Land Co. v. City of Mitchell* (So. Dak.), 48 N. W. Rep. 131.

⁴ *Edinburg-American Land Co. v. City of Mitchell* (So. Dak.), 48 N. W. Rep. 131.

⁵ *School Dist. v. Clark* (Mich.), 51 N. W. Rep. 529.

and actions for the purpose of having them recognized as valid claims could be maintained only against the school board, which is authorized to pass upon the validity of the evidence of indebtedness of every one who alleges that he is a creditor.¹ In an action upon a school order given for supplies furnished to a school district, the district may show the value of the supplies received and have the recovery limited thereto.² In an action upon such an order by an assignee of the same, an averment in the answer that a conspiracy had been entered into between plaintiff's assignor and a trustee of the school district to have the order in question made out for about \$200 more than the actual consideration received by the district, for their own personal gain, was held to sufficiently show fraud.³

§ 790. School district boards — Contracts for building.— The statutes of Dakota give the school district meeting power "to vote a tax annually, not exceeding one per cent. of the taxable property, . . . to purchase or lease a site, and to build, hire or purchase a school-house," and provide that the school board shall build, purchase or lease a school-house "out of the funds provided for that purpose." It has been held that the school meeting could not authorize a contract for a school-house for an amount exceeding the funds on hand, and the annual tax of one per cent. actually levied, and the use of the house by the district created no liability either under the contract or for the value received.⁴ The minutes of a district school meeting disclosed that a motion was carried to build a school-house, a tax levied for that purpose, and the school board appointed as a building committee, but it did not appear that the meeting selected a site or directed the erection of any building. The statute as to building and leasing school-houses provided for the purchase or lease of such site as shall have been designated by the school meeting, and building such school-house as the voters in the district meeting shall have agreed upon. The proceedings at

¹ *Fisher v. Board of Directors &c.* (La.), 10 So. Rep. 494.

² *Kittinger v. Monroe School Tp.* (Ind.), 29 N. E. Rep. 931.

³ *Kittinger v. Monroe School Tp.* (Ind.), 29 N. E. Rep. 931.

⁴ *Capital Bank v. School Dist.* (No. Dak.), 48 N. W. Rep. 363.

the school meeting as disclosed by the minutes were held not to authorize the board to build a school-house.¹

§ 791. Contracts with teachers.—One of the trustees of a graded school district acting as director cannot employ a superintendent of schools, under the Michigan statute which authorizes the *board* of trustees to employ such officers and servants as may be necessary for the management of the schools and the school property.² A contract signed by a teacher and one of the trustees when the board was not in session and afterwards approved at a special session of the

¹Capital Bank v. School Dist. (No. Dak.), 48 N. W. Rep. 363. See, also, Weitz v. Independent Dist. (1890), 79 Iowa, 423, 426, where the Iowa Supreme Court said:—"The power of the directors is limited and circumscribed by the statute. They can enter into no contract unless authorized to do so, when the terms of the contract, and the manner of binding the district, and the things to be done in order to bind it, as prescribed by the statute must be pursued. . . . The statute confers upon the school directors the power to contract for the building of a school-house with one who is the 'lowest responsible bidder,' and who shall furnish 'bonds with sufficient sureties for the faithful performance of the contract.' If plaintiff was not the lowest bidder and did not furnish the bonds required, the statute conferred no power upon the directors of the defendant to contract with the plaintiff." Parr v. Village of Greenbush, 72 N. Y. 463; Dickinson v. Poughkeepsie, 75 N. Y. 65; Dillon on Munic. Corp. (3d ed.), §§ 466, 468. In Farmers' & Merchants' Nat. Bank v. School Dist. (1889), 6 Dak. 255, it was held that school districts, being special statutory creations, have only such implied powers as are necessary to accomplish the purposes of their existence; also, that the warrants

issued by a school district board for building a school-house were void because they built the house without the authority or ratification of the voters of the district, the latter never having thereby designated, as the statute required, a site upon which it was to be built; also, that the warrants were void, having been issued as payable immediately and in excess of the restriction on the amount of revenues a school district might raise in one year; and that the district could defend on the ground that the warrants were issued in excess of its powers; and that the purchasers of such warrants must see that the powers of the corporation have not been exceeded.

²Davis v. School Dist. (1890), 81 Mich. 214. It was held, however, that in such a case, if the services contracted for were actually accepted by the board of trustees with full knowledge of all of the facts, the same rule should govern as to the liability of the corporation as is applied where money or other property is received under such circumstances; that the law raises an implied promise on the part of the corporation to pay for the same. See, also, Crane v. School Dist., 61 Mich. 299; Smith v. School Dist., 69 Mich. 589; Devoe v. School Dist., 77 Mich. 610.

board and there signed by another trustee is binding on the corporation.¹ Where the president of a board of school directors is authorized to employ teachers with the consent of the board, and one whom he employs as a teacher, by written contract, begins teaching under it, with the knowledge of each member of the board, who knows that the board has taken no action on the contract, the consent of the members will be presumed, and the contract held valid.² The board of education of the city and county of San Francisco under the authority given it by statute to employ teachers, and fix, allow and order paid their salaries, cannot appoint and employ "inspecting teachers" to perform duties imposed by the act on the board itself and on the superintendent, such as visiting the schools, ascertaining their condition by oral examinations, observing the methods of the teachers and giving them advice and instructions in the methods of teaching.³ Where the prudential committee of a school district employed one to teach a term of school, no vote of the district having been taken authorizing such action by the committee for that year, and the teacher performed her contract, the district was held liable therefor under the Vermont statute which provides that the prudential committee of a school district shall "appoint and agree with a teacher to instruct the school. . . ."⁴ Where school trustees, with the acquiescence of the school town, continue to act as such after the expiration of their term, and before their successors are appointed, they are officers *de facto*, and a contract with a teacher entered into by them has been held to be binding on the town.⁵ And a contract thus made, though it is not to be performed before the election of the new board, will bind the town.⁶ Where an

¹ *Town of Milford v. Powner*, 126 Ind. 528; s. c., 26 N. E. Rep. 484.

² *Hull v. Independent Dist. (Iowa)*, 46 N. W. Rep. 1053; s. c., 48 N. W. Rep. 82.

³ *Barry v. Goad*, 89 Cal. 215; s. c., 26 Pac. Rep. 785, reversing s. c., 24 Pac. Rep. 1023.

⁴ *Cobb v. School Dist. (Vt.)*, 21 Atl. Rep. 957.

⁵ *School Town of Milford v. Zeigler (Ind.)*, 27 N. E. Rep. 303.

⁶ *School Town of Milford v. Zeigler (Ind.)*, 27 N. E. Rep. 303. It was further held that a contract with a teacher by school trustees after the expiration of their term, and before their successors qualified, could not be assailed by subsequently elected trustees on the ground that it was fraudulently made by the former board in order to forestall them when it was not alleged that the teacher was a party to the fraud. See, also,

order employing a teacher is passed at a session of the board of school trustees, it is immaterial that the trustees signed the contract at different times.¹ Nor can a contract with a teacher be annulled by the subsequent action of a school town in abolishing the department in which she was engaged to teach.²

§ 792. Authority of county treasurer, etc.—A county being largely indebted on account of county and town bounties to volunteers, represented by short loans for which annual taxes were levied, the treasurer was authorized to obtain extensions as the towns might desire, by resolutions of the board each year till 1875. The treasurer assumed the authority of borrowing money on notes of the county signed by himself officially, and giving new notes for old notes and bonds. The board being empowered under a statute to borrow money and renew its obligations for bounties, which statute also ratified subsisting obligations of that nature, it was held that the treasurer's acts were binding on the county.³ A vote of a town ratifying the action of the selectmen in borrowing money, which is applied to taking up outstanding debts of the town, cannot be rescinded at a subsequent meeting.⁴ The fact that a county had collected and placed in the hands of its treasurer a sum sufficient to pay claims upon which it is sued does not operate as a payment of them, or relieve the county from the obligation to raise money to pay

Gates v. School Dist., 53 Ark. 468; s. c., 14 S. W. Rep. 656, in which it was held that a board of school directors empowered by statute without any limitation to employ a superintendent of schools might make a contract for a superintendent for a term beginning after some members of the board go out of office.

¹ *School Town of Milford v. Zeigler* (Ind.), 27 N. E. Rep. 303.

² *School Town of Milford v. Zeigler* (Ind.), 27 N. E. Rep. 303.

³ *Clark v. Saratoga County*, 107 N. Y. 553; s. c., 14 N. E. Rep. 428, following *Parker v. Saratoga County*, 106 N. Y. 392; s. c., 13 N. E. Rep. 308.

It was further held that the acts of a

county treasurer in procuring extensions of and renewing certain indebtedness, in pursuance of resolutions of the board, were binding on the county, there being no mistake as to the debt intended, although the resolutions gave it the name of a debt which did not exist; and that it was no defense to an action on such new obligations to show that the treasurer had fraudulently given notes largely in excess of the amount requested, without proof that the notes in suit represented a part of such excess.

⁴ *Brown v. Winterport*, 79 Me. 305; s. c., 9 Atl. Rep. 844.

them, if that placed with the treasurer for that purpose is by him appropriated to some other purpose.¹ It was held that the city of New Orleans was not liable for taxes collected for the metropolitan police by defaulting sheriffs simply because it allowed them privileges for accelerating the payment of such taxes and her own taxes from delinquents.²

§ 793. **Authority of officers in particular instances.**—A municipal corporation authorized by its charter to tax "all" the real and personal property therein has no power to exempt any of such property from taxation.³ A city cannot levy a special tax to pay for an improvement which has been made, without any ordinance authorizing it, before the proceedings to levy the special tax were begun.⁴ An act which places in the power of a board of commissioners of a county the approval of official bonds of certain officers does not confer upon it the power to release securities on those bonds on presentation of a new bond.⁵ A town cannot lawfully divide money received from an estate among its inhabitants, but unless there is clear proof of such an intention on the part of the town or of some of its officers or agents, an injunction to restrain such action will not be granted.⁶ Under the statute of Indiana providing for the county prison, where a steam-heating apparatus is placed in a jail, which for its operation requires a skilled engineer, such engineer, though employed by the sheriff, should be paid by the county outside of the sheriff's compensation.⁷ A county court in Missouri has no authority either to employ an attorney to assist in the prosecution of a suit for taxes or to charge the county with liability for his compensation.⁸ It has been held that a resolution of a board of freeholders to purchase lands at a price which was shown to be an excessive valuation by the evidence of experts

¹ *County of Caldwell v. Harbert*, 68 Tex. 321; s. c., 4 S. W. Rep. 607.

² *Harrison v. City of New Orleans*, 40 La. Ann. 509; s. c., 4 So. Rep. 133.

³ *Whiting v. Town of West Point* (Va.), 14 S. E. Rep. 698.

⁴ *City of Carlyle v. Clinton County* (Ill.), 30 N. E. Rep. 782.

⁵ *Sullivan v. State*, 121 Ind. 342; s. c., 23 N. E. Rep. 150.

⁶ *McFadden v. Town of Dresden*, 80 Me. 134; s. c., 13 Atl. Rep. 275.

⁷ *Board of Comm'rs v. Weeks* (Ind.), 29 N. E. Rep. 776; *Board v. Reissner*, 58 Ind. 260; s. c., 66 Ind. 568.

⁸ *Butler v. Sullivan County* (Mo.), 18 S. W. Rep. 1142.

in such matters should be set aside.¹ A contract entered into by two members of the board of county commissioners, outside of their county, and without any previous authority from the board, has been held void in the absence of any subsequent ratification of the contract by the board.²

§ 794. **The same subject continued.**—Under the constitution of North Carolina, which prohibits a municipal corporation from contracting any debt unless authorized by a majority of its qualified voters, in the absence of such authority a township is not bound by the appointment of its agents by the county commissioners and township justices to subscribe for railroad stock on behalf of the township, and to represent it and vote at meetings of stockholders and by the exercise of such authority by such agents.³ The power of city boards of improvement to bind their districts for the payment of interest on a debt legally contracted is implied from the powers expressly conferred on the boards by the Arkansas statutes which provide that such boards shall have control of improvements in their districts, may make all contracts in reference thereto, borrow money at interest, and pledge all uncollected assessments for the payment thereof.⁴ Such city boards of improvement are not municipalities within the meaning of the constitution of Arkansas, declaring that no "municipality in that State shall ever loan its credit or issue any interest-bearing evidences of indebtedness."⁵ Municipal officers authorized to purchase and hold for the benefit of the town property to a certain value, and also to maintain public schools, and to this end, as well as to defray the ordinary expenses of municipal government, to levy taxes, may buy a school-house (its value, together with the property already owned, not exceeding the value of property in its power to hold) on credit and give warrants therefor.⁶ Where, however, the municipal officers have no express authority to borrow money, and instead of the warrants being given to the vendor of the school-house they bor-

¹ *State v. Board* (N. J.), 22 Atl. Rep. 343.

² *Willis v. Webb* (Kan.), 27 Pac. Rep. 825.

³ *Lynchburg &c. R. Co. v. Board of Comm'rs* (N. C.), 13 S. E. Rep. 783.

⁴ *Fitzgerald v. Walker* (Ark.), 17 S. W. Rep. 702.

⁵ *Fitzgerald v. Walker* (Ark.), 17 S. W. Rep. 702.

⁶ *Allen v. Intendant*, 89 Ala. 641; s. c., 8 So. Rep. 30.

row money and give warrants therefor, and with the money pay the vendor, the warrants are void, but the town is liable on an implied contract to repay the money which it has received and applied to an authorized purpose.¹ A settlement by an overseer of the poor of an action brought by himself or his predecessor for penalties for the violation of the excise laws, when honestly made in furtherance of general public opinion, and upon terms fair and reasonable, is within the power of the overseer, and will not be interfered with by a court of equity.² Though there may be a law authorizing the appointment of a board of park commissioners with power to purchase, condemn, pay for and regulate the parks of a city, it being discretionary whether they be chosen, where there has not been appointed such a board the power remains in the city council to purchase or condemn and to improve and care for these public grounds.³ And the city council has the power without a vote of the electors, as the statute authorizes expenditures from the general fund for such purposes.⁴ The council of a borough organized under the New Jersey statute has no right to enter into a contract by which the public moneys are to be expended and borough bonds are to be issued to pay for grading and filling a street, unless such grading and filling have been directed to be done by an ordinance.⁵

§ 795. Power of a trustee of a school township.—The limitation of the trustee's authority is in respect to the manner and extent of contracting debts for the township, and when the debt is lawfully contracted the trustee has the necessarily resulting power of giving the creditor a proper written acknowledgment and promise to pay.⁶ Where a trustee, acting for a school township, buys furniture which is received and

¹ *Allen v. Intendant*, 89 Ala. 641; s. c., 8 So. Rep. 30.

² *Olf v. Leddick*, 59 Hun, 627; s. c., 14 N. Y. Supl. 41.

³ *In re City of Cedar Rapids* (Iowa, 1892), 51 N. W. Rep. 1142.

⁴ *In re City of Cedar Rapids* (Iowa, 1892), 51 N. W. Rep. 1142.

⁵ *State v. Brigantine Borough* (N. J., 1892), 24 Atl. Rep. 481. The court

said:—"The resolution [of the council] attempts to bind the borough and pledge its credit for the payment of money to be expended to accomplish a purpose, which purpose has no legal existence."

⁶ *Noble School Furniture Co. v. Washington School Tp. (Ind.)*, 29 N. E. Rep. 935.

used in the schools, and is of the value agreed to be paid, an acknowledgment of indebtedness issued by him on behalf of the township constitutes a valid written contract, and is not within the statute of limitations governing actions on accounts and contracts not in writing.¹ That the trustee of a township, without first being authorized by the court commissioners, incurred indebtedness in excess of the fund in hand to which it was chargeable, as forbidden by the statutes of Indiana, has been held a matter of defense which it was incumbent on the township to plead in an action for the indebtedness, and that it was not necessary for the plaintiff to anticipate possible objections that do not appear.²

§ 796. **Town selectmen, etc.**—Under the power given by Connecticut statutes to superintend the concerns of the town, the selectmen may, though the town itself has taken no action, employ counsel and spend its money in proper ways in opposing a petition asking the legislature to divide its territory and apportion its property, debts and liabilities.³ Under the Indiana statute which provides that the town trustees may negotiate and sell town bonds, the trustees can employ a broker to effect the sale.⁴ And the contract need not be in writing.⁵ In a suit by a broker to recover for his services under such a contract the complaint need not show that the bonds sold by the plaintiff were legally issued.⁶ Where money has been appropriated by a county to a town, and received by

¹ *Noble School Furniture Co. v. Washington School Tp. (Ind.)*, 29 N. E. Rep. 935; *s. c.*, 6 N. E. Rep. 123, and 7 N. E. Rep. 763.

² *Noble School Furniture Co. v. Washington School Tp. (Ind.)*, 29 N. E. Rep. 935. See, also, *Litten v. School Tp.*, 127 Ind. 82; *s. c.*, 26 N. E. Rep. 567; *School Tp. v. Barnes*, 119 Ind. 213; *s. c.*, 21 N. E. Rep. 747; *Bloomington School Tp. v. Nat. School Furnishing Co.*, 107 Ind. 43; *s. c.*, 7 N. E. Rep. 760; *State v. Hawes*, 112 Ind. 323; *s. c.*, 14 N. E. Rep. 87; *Boyd v. School Tp.*, 114 Ind. 210; *s. c.*, 16 N. E. Rep. 511; *Union School Tp. v. First Nat. Bank*, 102 Ind. 464; *s. c.*, 2 N. E. Rep. 194; *Johnson School Tp. v. Citizens' Bank*, 81 Ind. 515; *Brownlee v. Board*, 81 Ind. 186; *Long v. Straus*, 107 Ind.

Washington School Tp. (Ind.), 29 N. E. Rep. 935. See, also, *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121; *Jefferson School Tp. v. Litton*, 116 Ind. 467; *s. c.*, 19 N. E. Rep. 323.

³ *Farrel v. Town of Derby*, 58 Conn. 234; *s. c.*, 20 Atl. Rep. 460.

⁴ *Reed v. Town of Orleans (Ind.)*, 27 N. E. Rep. 109.

⁵ *Reed v. Town of Orleans (Ind.)*, 27 N. E. Rep. 109.

⁶ *Reed v. Town of Orleans (Ind.)*, 27 N. E. Rep. 109.

an officer of the town for the town, he is bound to account for it to the town, though the county had no authority to make the appropriation, and the payment to him was without warrant of law.¹ And it is no defense in an action against them for this money that the officer expended it for the use of the town in repairing its highways and bridges, where he expended it without any direction from the town board as provided by the Wisconsin statutes, and without thereafter rendering an account to the board to be audited and allowed as provided by other statutes.² A resolution of the county board authorizing a town to erect a bridge and issue its bonds in payment therefor is rendered entirely void by the failure of the board to require, as provided in New York statutes, adequate security, in addition to that given for the faithful performance of their ordinary duties, from the officers charged with the duty of issuing the bonds and disbursing the proceeds.³ An application of the funds of a town, derived from taxation, for purposes beyond the purview of municipal grant, is a wrongful appropriation of the funds held in trust for the tax-payers and people to pay the legitimate expenses of the town, and is null and void. Resident tax-payers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the corporation or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay.⁴

§ 797. The same subject continued.—Neither the selectmen nor the treasurer of a town in Connecticut have general power to borrow money or to incur any debts in behalf of the town.⁵ Selectmen authorized to borrow money and pay

¹ *Town of Remington v. Ward*, 78 Wis. 539; s. c., 47 N. W. Rep. 659.

² *Town of Remington v. Ward*, 78 Wis. 539; s. c., 49 N. W. Rep. 659.

³ *Barker v. Town of Oswegatchie*, 10 N. Y. Supl. 834.

⁴ *Peck v. Spencer* (1890), 26 Fla. 23, in which case the court held there was no power expressly given in its charter, or by reasonable implication, to the town council, to appropriate money in the defense of contested

election cases. They said:—"These contests are personal, and the corporation can have no interest in the result, and an appropriation to pay any one of the parties the expenses he may be put to is without legal authority." See, also, *Lanier v. Padgett*, 18 Fla. 842; *Cotton v. Comm'rs*, 6 Fla. 610; *Murphy v. City of Jacksonville*, 18 Fla. 318.

⁵ *Town of Bloomfield v. Charter Oak Nat. Bank* (1886), 121 U. S. 121;

certain claims cannot, under such authority, give the notes of the town to the claimants. They must pay whatever money they borrow to the town treasurer and then draw their orders on him for it.¹ Towns in Connecticut, it has been held, while having power to build town halls, have no power to build a structure containing a town hall, the greater part of which is designed to be rented to private parties for other uses.² In the absence of authority so conferred, a town has no power to appropriate money for gratuities to men drafted for the military service of the United States.³ But the actions of towns in illegally appropriating money to such purposes, it has been held, might be confirmed and made binding upon such towns by a retroactive legislative act.⁴ Township supervisors in Pennsylvania may lawfully borrow money in good faith to repair roads and bridges injured or destroyed by a flood.⁵ The board of health of a township has power, and it is its duty during the prevalence of a contagious disease, if necessary, to employ a physician, and the township is primarily liable in the premises; and such physician is not bound to look anywhere else for payment, his contract being with the township.⁶ A town in Connecticut having voted to build an almshouse appointed a committee to procure plans and specifications to be submitted to builders, and directed them to give the contract to the lowest responsible bidders. The committee decided to give the contract to parties who were not the lowest responsible bidders. The Supreme Court held an injunction in a suit of a tax-payer in restraint of the town authorities was improperly granted, as the matter was wholly within

s. c., 7 S. Ct. Rep. 865. It was also held that the reports made to an annual meeting of the town by the selectmen and treasurer as required by statute are not, unless acted on by the town, evidence to charge it with debts which those officers had no authority to contract in its behalf.

¹ Ladd v. Franklin, 37 Conn. 62, 70.

² White v. Stamford, 37 Conn. 578, holding, however, that it is competent for the legislature to validate the transaction.

³ Booth v. Woodbury, 32 Conn. 125;

Stuart v. Warren, 37 Conn. 228; State v. Fyler, 48 Conn. 159.

⁴ Bartholomew v. Harwinton, 33 Conn. 410; Potter v. Canaan, 37 Conn. 224.

⁵ Maneval v. Township of Jackson (Pa.), 28 W. N. C. 130; s. c., 21 Atl. Rep. 672.

⁶ Wilkinson v. Tp. of Long Rapids (1889), 74 Mich. 63. See, also, Rae v. Flint, 51 Mich. 526; s. c., 16 N. W. Rep. 887; Elliott v. Supervisors, 58 Mich. 452; s. c., 25 N. W. Rep. 461.

the control of the town, which could confirm and accept the actions of its committee or deny its responsibility for their acts.¹

§ 798. Township boards.— A Michigan statute authorizing a township board to issue township bonds to the amount of \$4,000 for the payment of certain outstanding orders was held not to require the payment of all such orders, whether valid or invalid, but to leave it in the power of the township board to determine their validity.² Under another Michigan statute prohibiting the issuance of highway or contingent orders in excess of the funds provided for those purposes, the mere fact that there were outstanding orders to pay which there was no money did not show that such orders were illegal when it did not appear what moneys were raised for the year in which the orders were issued or that the moneys so raised were not applied to some other purpose.³ Where a committee is appointed at a town meeting to procure plans and specifications for a school-house, and the treasurer of the town is authorized to borrow a sum not exceeding a certain amount for the use of the committee, the authority of the committee to incur debts on behalf of the town is limited to that amount.⁴ And the fact that the town adopts the report of such a committee in relation to the erection of such a building does not ratify an expenditure in excess of such amount, where it does not appear that the report informed the town of such increased expenditures.⁵

§ 799. The same subject continued — Michigan decisions.
In general the presentation to the board of a claim against

¹ *Dibble v. Town of New Haven* (1888), 56 Conn. 199. The court said "has to restrain the agent of an individual."

² *Boyce v. Auditor-General* (Mich.), 51 N. W. Rep. 457.

³ *Boyce v. Auditor-General* (Mich.), 51 N. W. Rep. 457.

⁴ *Brown v. Inhabitants of Melrose* (Mass.), 30 N. E. Rep. 87. See, also, *Turney v. Town of Bridgeport*, 55 Conn. 412; s. c., 12 Atl. Rep. 520.

⁵ *Brown v. Inhabitants of Melrose* (Mass.), 30 N. E. Rep. 87.

a township confers jurisdiction to decide whether the claim is a valid township charge or not, pleadings or formal papers not being required.¹ The presence of the claimant before the board is not necessary to the allowance of his account. Nor is it necessary that the account should be sworn to (although it must be in writing) or that it be proved by evidence under oath. The board may act upon its own knowledge of the demand, and if satisfied of its correctness that is enough.² Where a township board assumes to pass upon and allow a class of claims over which the law gives it no jurisdiction, its allowance is void, and the supervisor and township clerk cannot be compelled by *mandamus* to issue orders thereon.³ Under a statute of Michigan the township boards, independent of any vote of the electors, might raise money to pay claims audited and allowed against the township.⁴ A township is not estopped by the action of its board in settling with the treasurer from suing him for an additional amount afterwards found to be due and overlooked in the settlement.⁵ A township treasurer who holds for a new school district a tax collected to pay its ascertained proportion of the value of school property in the district of which it was formerly a part cannot receive school orders on the old district for such tax; he cannot use the fund for any purpose except to pay it over to the new district, and if he does so he is liable to account for it as though never drawn out.⁶ A warrant drawn upon the township treasurer by the director of a school district and countersigned by the moderator is not a negotiable instrument, and no action can be maintained thereon by a transferee.⁷ The assessor of a school district is

¹ Wall v. Turnbull, 16 Mich. 228.

² Wall v. Turnbull, 16 Mich. 228.

³ People v. Blackman, 14 Mich. 336.

⁴ Wisner v. Davenport, 5 Mich. 501.

⁵ Boardman v. Flagg, 70 Mich. 372.

⁶ Midland School Districts, 40 Mich. 551.

⁷ Fox v. Shipman, 19 Mich. 218. In Fractional School Dist. v. Mallory, 23 Mich. 111, it was held that an order drawn by the director upon the township treasurer for school money

should be made payable to the district assessor, and was void if drawn payable to "A. or bearer." In Stockwell v. White Lake, 22 Mich. 341, it was held that the duty of a moderator of a school district to countersign an order drawn by the director upon the assessor is not merely ministerial. He has a right to satisfy himself that the director drew it for a valid claim, and in the proper performance of his duty.

the lawful treasurer and depository of school district funds, and all moneys must pass through his hands and be paid out by him on proper orders.¹

§ 800. **Town trustees — Indiana decisions.**— The board of trustees of a town in Indiana have incidental power to employ counsel to defend an action for false imprisonment brought against the town marshal by one arrested by him for the violation of a town ordinance, and a claim for services rendered under such employment may be enforced against the town.² A town possesses inherent power to purchase fire-engines for the protection of the property of its citizens from fire.³ A township has been held not to be liable upon a certificate issued by its trustee for school supplies contracted for by him for future delivery, which supplies, although suitable, were not needed in the township schools, and which the township refused to accept.⁴ A township trustee has no authority to accept the note of his predecessor in payment of the sum due from him to the township, but the outgoing trustee is required to pay his obligation in money.⁵ The sureties on the bond of a defaulting township trustee cannot recover against the township, as assignees of an order of the board of county commissioners, payable out of the township funds, given to the trustee for his services and assigned for the indemnity of his sureties, so long as the township has an unpaid judgment against the township trustee for the money lost by his default in excess of the amount of the order.⁶ An obligation for property bought for the use of a township, and received by it, may be given by the trustee.⁷ While a township trustee

¹ Midland School Districts, 40 Mich. 551. See, also, *Burns v. Bender*, 36 Mich. 195. The township treasurer can pay school moneys only to the school district assessor, and then only on the warrant of the proper district officers.

² *Cullen v. Town of Carthage* (1885), 103 Ind. 196.

³ *Corporation of Bluffton v. Studabaker* (1886), 106 Ind. 129.

⁴ *Boyd v. Mill Creek School Tp.* (1888), 114 Ind. 210.

⁵ *Madison Tp. v. Dunkle* (1888), 114 Ind. 262.

⁶ *Heth Tp. v. Lewis* (1888), 114 Ind. 508, holding that the order of allowance is not a commercial instrument and the surety's rights are no greater than the principal's.

⁷ *Pine Civil Tp. v. Huber Mfg. Co.* (1882), 83 Ind. 121. In *Wallis v. Johnson School Tp.* (1888), 75 Ind. 368, it was held that where a promissory note signed by a township trustee appears upon its face to have

has no authority to borrow money for the use of the school corporation, yet for money borrowed and actually used for the benefit of the school township, in a legitimate way, as in payment of a corporate indebtedness, the school township may be held liable.¹

§ 801. **The same subject continued.**—The trustee of a school corporation has power to contract a debt in the name of and binding upon such corporation in the purchase of necessary furniture, apparatus and other supplies of its schools, and to execute in the name of his corporation a valid and binding certificate of indebtedness or note for the amount of such debt, and such certificate or note will constitute *prima facie* a good cause of action against the corporation.² And it had before been held that payment of such a note could not be resisted upon the grounds that the goods were not needed and that the price of the goods—in this case school furniture—was too high, unless fraud be shown, and not then without an offer duly made to return the goods.³ This power has been still further qualified by a ruling that such a con-

been intended to impose an obligation on the township, and it appears that the consideration therefor moved to the township, the contract should be regarded as that of the corporation, and not as that of the officer whose name is signed to it.

¹First Nat. Bank v. Union School Tp. (1881), 75 Ind. 361; Bicknell v. Widner School Tp. (1881), 73 Ind. 501; Wallis v. Johnson School Tp. (1881), 75 Ind. 368; Union School Tp. v. First Nat. Bank (1885), 102 Ind. 464, holding that where the school trustee borrows money and executes notes therefor in the name of the school corporation, the corporation will be liable if the money is actually used for the payment of legitimate claims against the corporation, and the circumstances are such as make it equitable that the lender should be subrogated to the rights of the persons whose claims the borrowed

money paid. But where the trustee has money in his hands derived from the school revenues or funds, such subrogation cannot occur. The authority of the trustee is purely statutory, and all who deal with him must, at their peril, ascertain the extent of his authority. Bloomington School Tp. v. National & Co. (1886), 107 Ind. 43.

²Miller v. White River School Tp. (1885), 101 Ind. 503. It was further held that such a certificate was not rendered invalid by the trustee's failure to comply with the provisions of R. S. Ind. 1881, §§ 6006, 6007, as those sections of the statute have no application to the ordinary debts of a school corporation, incurred by the trustee for the usual and necessary furniture, apparatus and other supplies of its common schools.

³Johnson School Tp. v. Citizens' Bank (1832), 81 Ind. 515.

tract for school supplies could not be made by the trustee unless the supplies were suitable and reasonably necessary for the township, and had been actually delivered to and received by the township.¹ Under the statutes of Indiana, which provide in substance that township trustees cannot contract debts on behalf of their township in excess of the fund on hand to which such debts are chargeable, and of the fund to be derived from the tax assessed against their townships for the year in which such debts are to be incurred, without first procuring an order from the board of county commissioners authorizing them to contract such debts, and that in order to procure such an order they shall file a petition setting forth the object for which the debts are to be incurred, and give twenty days' notice of the filing of such petition, the trustees of a school township, without an order from the board of county commissioners authorizing it, cannot contract a debt for the building of a school-house which will make the aggregate debts chargeable to the special school fund exceed the amount of that fund on hand and to be derived from the tax assessed against the township for the year in which the debt is to be incurred.²

¹ *State v. Hawes* (1887), 112 Ind. 323. See, also, *Reeve School Tp. v. Dodson*, 98 Ind. 497, where the complaint in such a case was held bad on demurrer for its failure to aver that the articles purchased for the benefit of the schools were suitable or necessary, or that they had been received by the township. As to the paper creating no obligation against any one, *Axt v. Jackson School Tp.*, 90 Ind. 101; as to the rights of the assignee being no more than that of the person to whom it was issued, *Sheffield School Tp. v. Andress*, 56 Ind. 157; *McCurdy v. Bowes*, 88 Ind. 583; *Mayor v. Ray*, 19 Wall. 468; *Wall v. County of Monroe*, 103 U. S. 74; *Police Jury v. Britton*, 15 Wall. 566; *First Nat. Bank v. Rush School Dist.*, 81 Pa. St. 307; as to the invalidity of such a paper, *Bissell v. Spring Valley Tp.*, 110 U. S. 162; *School Dist. v. Stone*, 106 U. S. 183;

Merrill v. Town of Monticello, 16 Cent. L. J. 90.

² *Middleton v. Greeson* (1885), 106 Ind. 18, holding tax-payer entitled to an injunction; also, that the statutes limited the authority of the town trustee to contract debts, whether on behalf of the civil or school district. The court said:—"The legislation of the State clearly shows that the contracting of debts by township trustees on behalf of both their school and civil townships was regarded by the legislature as a growing evil, and one that should be checked. We think, too, that the legislation and the use of the words 'township trustee' therein show that generally the legislature regarded these words as sufficiently comprehensive and specific to include the township trustee in his dual capacity as trustee of the civil and school townships."

§ 802. **Directors of schools — Illinois decisions.**— For the purpose of building school-houses, purchasing school sites, or for repairing or improving the same, school directors in Illinois, by a vote of the people of their district, are authorized to borrow money and give bonds therefor executed by any two of them.¹ The power to borrow money carries with it at common law, independent of the statute, the power to give evidence of the loan. The power in school directors to give bonds for money borrowed given by statute is not a limitation but an enlargement of their powers. An order given by them or their treasurer, or other simple evidence of indebtedness for money borrowed for school-house purposes, is valid and may be enforced against the district.² When school directors borrow money under authority of the statute, their duty is to pay it to their treasurer, who is the only proper custodian. Should they place it in the hands of any one else, it is at their own risk.³ School directors have no power to make acceptances of orders or bills of exchange so as to bind the school district and create a right of action against them.⁴ A contract by school directors for the purchase on credit of school apparatus, where it did not appear that there were any surplus funds after all necessary school expenses were paid applicable to such purchase, has been held void.⁵ Orders drawn by school directors on the township treasurer in payment for building a school-house without a vote of the people

¹ *Folsom v. School Directors*, 91 Ill. 402.

² *Folsom v. School Directors*, 91 Ill. 402. In *School Directors v. Sippy*, 54 Ill. 287, it was held that this power to borrow money upon a vote of the people could not be enlarged by construction or implication, so as to authorize them to execute promissory notes which in themselves would be binding on the district.

³ *Adams v. State of Illinois*, 82 Ill. 132. The reason for the rule is that their duties are derived exclusively from the statute and are specifically defined, and if they exercise powers

and functions not conferred upon them, the statute makes them responsible for all losses that may ensue.

⁴ *Peers v. Board of Education*, 73 Ill. 508.

⁵ *Clark v. School Directors*, 78 Ill. 474, holding the authority given to school directors by statute to "appropriate to the purchase of libraries and apparatus any surplus funds after all necessary expenses are paid" to be a limitation to their power to make such purchases to the circumstances named, and to be an implied restriction of any power to purchase generally on credit.

on the question will be void even in the hands of an assignee, and the successors of such directors may contest their validity.¹

§ 803. **Town supervisors — Illinois and Minnesota decisions.**—It has been held in Illinois that, under existing legislation, the authority of a supervisor of a town to employ counsel to represent the town in defending a suit in the United States courts upon bonds of the town, the validity of which was disputed, might well be implied, and especially where the contract had been fully executed, the services all performed, their benefit enjoyed, and acquiescence by the town in the contract of employment during the seven years of litigation.² The statute confers upon towns, at their annual meetings, the power to provide for the institution and defense of all suits in which the towns are interested, and a town meeting may properly exercise that power by resolution directing the supervisor to procure legal services, and such a contract will be binding on the town when the amount agreed to be paid is not so great, in view of the interests involved, as to indicate bad faith.³ Township treasurers, under the Illinois statute, are made insurers of the funds coming to their possession, and nothing can excuse them from their obligation to safely keep and pay over such funds but the act of God or the public enemy.⁴ A judgment against a town, under the township system, is made a town charge, and the board of town auditors have no discretion or power to refuse to audit and certify the amount necessary to satisfy the same, and if they refuse they will be compelled to do so by *mandamus*.⁵ Where a county in Minnesota had by its board of

¹ *School Directors v. Fogleman*, 76 Ill. 189, holding also that the levying of a tax to defray these expenses, and the acceptance of the building and teaching school therein, could not legalize the act or bind the tax-payers.

² *Town of Bruce v. Dickey*, 116 Ill. 527.

³ *Town of Mt. Vernon v. Patton*, 94 Ill. 65. In *Cooper v. Town of Delavan*, 61 Ill. 96, it had been al-

ready held that the supervisors might employ attorneys to attend to suits against the towns they represented, and the town would be liable to the attorney to pay a reasonable compensation for services rendered.

⁴ *Thompson v. Board of Trustees*, 30 Ill. 93. See, also, *United States v. Prescott*, 3 How. 578.

⁵ *Town of Lyons v. Cooledge*, 89 Ill. 529.

commissioners voted \$200 towards building a bridge in a town, county orders to be issued thereon on the order of the chairman of the board of supervisors of the town, and the town voted \$700 for the bridges, especially that one and another; and the town authorities then made a contract for the construction of these bridges for \$900, payable in town and county orders, it was held that this contract would be presumed to have been made with reference to these two appropriations, and was therefore not void as one incurring a town debt, or expenditure of town money, for an amount greater than was authorized by the vote of the town meeting.¹

§ 804. Power of towns and town officers in Maine.— It is competent for a town in Maine, in its corporate capacity, by a vote of the majority, to release a debt as well as to contract one.² So it, or its officers duly authorized, may settle a disputed claim and enforce a tax to raise money for its payment.³ The words “and for other necessary town charges,” as used in the statutes, authorize towns to employ a reasonable number of agents or attorneys to advance or protect the rights of the town before any legally constituted tribunal. But they do not authorize a town to raise and expend money to send lobbyists to the legislature.⁴ Nor can a town incur expenses in opposing before a legislative committee a division of its territorial limits.⁵ Selectmen are not required or permitted to violate the law by paying over money of the town in obedience to an illegal vote of the town.⁶ In drawing an order upon the treasurer in payment of a debt due from the town, selectmen have authority to make it negotiable in its form.⁷ The signature of one selectman to a written contract cannot bind the town.⁸ Selectmen have the right to prose-

¹ *Evans v. Town of Stanton*, 23 Me. 250; *Westbrook v. Deering*, 63 Me. Minn. 368.

² *Alma v. Clough*, 8 Me. 334.

³ *Vose v. Frankfort*, 64 Me. 229. And the expense of collecting and the necessary abatements are to be taken into consideration in fixing the amount to be raised.

⁴ *Frankfort v. Winterport*, 54 Me.

231.

⁵ *Westbrook v. Deering*, 63 Me. 231.

⁶ *Hooper v. Emery*, 14 Me. 375.

⁷ *Willey v. Greenfield*, 30 Me. 452.

⁸ *Richmond v. Johnson*, 53 Me. 437. In *Crommett v. Pearson*, 18 Me. 344, it is held that one of the selectmen may employ the hand of another to affix his signature.

cute and defend pauper suits in which their towns are interested, and their written contracts to such an end will bind the towns although not authorized by any special vote.¹ Overseers of the poor are justified in advancing money, employing counsel and rendering assistance in the prosecution of a bastardy process where the complainant is poor and an inhabitant of the town.² A town agent and selectmen may, without a vote of the town, purchase or receive a negotiable note for the purpose of meeting an expected claim upon the town by the maker of the note.³

§ 805. Powers of towns in Massachusetts.—It has been held in Massachusetts that towns have no authority, under the statutes, to vote money and cause it to be assessed upon the inhabitants, for the purpose of raising and maintaining a military force for their protection against an enemy in time of war, nor for the purpose of giving additional wages to those of the militia of the town who have enlisted or who have been drafted to serve in the army of the United States; nor for any other purpose of defense against an invading enemy.⁴ Nor have they authority to raise money for building a theater, or any other place of mere amusement; nor for the purpose of raising a statue or a monument, unless, in popular and wealthy towns, they should be thought suitable ornaments to buildings or squares, the erecting and maintenance of which are within the duty and care of the governor or of officers of such towns.⁵ Nor to raise money to aid in the construction of a highway which by law is to be made at the expense of the county.⁶ A town which also acts as a parish may raise money to repair a meeting-house, as a compensation for its use for municipal purposes, or to pay a sexton for ringing the bell for town meetings.⁷ It has authority

¹ *Industry v. Harks*, 65 Me. 167.

² *Dennett v. Nevers*, 7 Me. 399.

³ *Augusta v. Leadbetter*, 16 Me. 45. See, also, *Belfast v. Leominster*, 1 Pick. 123; *Davenport v. Hallowell*, 1 Fairf. 317; *Blake v. Windham*, 13 Me. 74; *Willard v. Newburyport*, 12 Pick. 227.

⁴ *Stetson v. Kempton* (1816), 13 Mass. 272.

⁵ *Parker, C. J.*, in *Stetson v. Kempton*, 13 Mass. 279.

⁶ *Parsons v. Goshen* (1831), 11 Pick. 336.

⁷ *Woodbury v. Hamilton* (1828), 6 Pick. 101.

to provide for the repair of a public clock.¹ It is also authorized to appropriate money for the repair of fire-engines used, for the purpose of extinguishing fires therein, whether they belong to the town or are purchased by private subscription,² and for the construction of reservoirs for water to supply fire-engines.³ Cities and towns have authority in their corporate capacity to build a market-house, to appropriate money therefor, and to assess the same upon the inhabitants.⁴

§ 806. **Michigan decisions.**—Highway commissioners have no authority to involve a township in Michigan in debt, at their discretion, for building bridges.⁵ Neither will a contract, by such commissioners to pay for a sewer in an incorporated village within the limits of a township bind the township, nor would partial payment of its cost amount to a valid ratification of the contract.⁶ A township is liable to one who has been wrongfully taxed for the amount received from him, even though it has been paid out from the township treasury on orders from the proper school and highway authorities.⁷ Where a township treasurer defaults in paying over money due the county, the township is liable to the county, which

¹ Willard v. Newburyport (1831), 12 Pick. 227.

² Allen v. Taunton (1837), 19 Pick. 485.

³ Hardy v. Waltham (1841), 3 Met. 163.

⁴ Spaulding v. Lowell (1839), 23 Pick. 71, where it was also held that the appropriation of certain parts of the market-house to other subordinate purposes was not such an excess of authority as to render the erection of the building and raising money therefor illegal.

⁵ Hosier v. Higgins Township Board, 45 Mich. 340. In Wrought Iron Bridge Co. v. Jasper (1888), 68 Mich. 441, it was held that a township was not bound by the joint action of its highway commissioners with one of another township in contracting for a bridge on that part of

the highway between the two towns which had been allotted to the other town; nor did its knowledge that the work was going on or the use by its inhabitants of the bridge validate the contract.

⁶ Sault Ste. Marie Highway Comm'rs v. Van Dusen, 40 Mich. 429.

⁷ Byles v. Golden, 53 Mich. 612. For the township treasurer is an officer and agent of the township in collecting such taxes as would be retained in the township treasury after paying to the county treasurer the State and county taxes. And township orders received in the township treasury as money on collection of taxes are equivalent to money and must be accounted for in the same way.

liability must be enforced by *mandamus* to have the amount of taxes re-assessed against the township.¹

§ 807. **Selectmen in New Hampshire.**—It seems that a vote by a town to raise money to build a court-house is unauthorized by law; the town was nevertheless held liable for the services and expenses of a committee appointed by a separate vote of the same meeting to apply to the legislature for a law that one term of the court in each year be held in that town.² Selectmen have not a general authority to bind a town by contract.³ They are general agents for towns in respect to pecuniary matters, and unless restrained by specific instructions are warranted in paying any existing debts of the town which, in the exercise of a sound discretion, should be paid.⁴ They cannot, as such, adjust controversies or suits of the corporation nor bind it to the payment of money for such an adjustment by a written contract.⁵ Nor can they borrow money upon the credit of the town.⁶ They have power to institute a suit in favor of the town to recover back usurious interest.⁷ In some cases they may bind the town by a promissory note, but the burden will be upon the holder to show that in giving the note they acted within the scope of their authority.⁸ One of the selectmen cannot release an action of debt on a bond given by the collector of taxes to the select-

¹ *Hart v. Oceana*, 44 Mich. 417. And this remedy is not barred by an adverse judgment in a suit on the defaulting treasurer's bond. And in *Oceana v. Hart*, 48 Mich. 319, it was held not to be a defense that the amount actually collected by the defaulter was less than the amount of local taxes which the township might have retained before making payments to the county treasurer.

² *Bachelor v. Epping*, 28 N. H. 354, 359.

³ *Andover v. Grafton*, 7 N. H. 298, 300.

⁴ *Sanborn v. Deerfield*, 2 N. H. 251.

⁵ *Underhill v. Gibson*, 2 N. H. 352.

⁶ *Rich v. Errol*, 51 N. H. 350. And

a *bona fide* indorsee of such a contract cannot recover by merely proving the borrowing of money and the giving of a town note for it by the selectmen; he must show their authority, or else that the money came to the use of the town. See, also, *West v. Errol*, 58 N. H. 233; *Eaton v. Berlin*, 49 N. H. 219, where it was held that such an indorsee could not recover upon a town order drawn by the selectmen upon the treasurer and accepted by him, where the only consideration was an enlistment of a minor in a regiment out of the State.

⁷ *Albany v. Abbott*, 61 N. H. 157.

⁸ *Andover v. Grafton*, 7 N. H. 298, 300.

men as obligees for the use of the town.¹ One selectman cannot bind the town by signing a note with his own name "for the selectmen;" nor will the note be made good by proof that another selectman authorized him to sign it.² An award by arbitrators, made on the submission of selectmen, is binding on the town when it has no other authorized agent.³ The liability of a town treasurer and his sureties on his official bond for a sum of money in his hands due the town is not discharged by his own note for that sum accepted by his official successor as cash in full payment and discharge of the debt and with the assent of a selectman.⁴

§ 808. **Towns and town officers in New York.**—A board of town auditors in New York have not the right to audit their own accounts.⁴ They may disregard the verification to an assessor's bill for services, ascertain the time necessarily spent by him, and reduce the bill accordingly.⁶ Only the final action of such a board, which consists in making and signing a certificate, terminates their right to reconsider and re-examine accounts.⁷ Where the board of town officers under a New York statute directed the supervisor of a town to raise the amount of unpaid taxes upon certificates of indebtedness, and the supervisor issued an extra certificate after he had issued others, the proceeds of which he used to pay the county treasurer the amount of the unpaid taxes, in an action by the *bona fide* holder of the extra certificates the town was held to be estopped from setting up the lack of authority in its agent, the supervisor, to issue it.⁸ The proceedings at a special town meeting called to consider the propriety of instituting or defending certain suits, and to raise money therefor, have been held to have been regular, and to make valid a claim for his reasonable charges and expenses by one authorized

¹ Horn v. Whittier, 6 N. H. 88.

² Andover v. Grafton, 7 N. H. 298.

³ Fogg v. Dummer, 58 N. H. 505.

⁴ Henniker v. Wyman, 58 N. H. 528.

⁵ Att'y's-Gen'l Opinions, 1796-1872, p. 538.

⁶ People v. Whalen (1877), 5 Weekly Dig. 410.

⁷ People v. Auditors, 5 Hun, 647, where a claim was presented and au-

dited by the board of town auditors, and at a subsequent meeting was reduced, and included at the reduced amount in a summary and certificate signed by the board as required by law. See People v. Stocking, 50 Barb. 573.

⁸ Gifford v. Town of White Plains, 25 Hun, 606.

thereat to bring the suits.¹ Towns have no power to contract for construction of bridges without special authority from the legislature.² Electors assembled in a town meeting have not power to vote money for a reward, and the town board has not power to audit a claim for a reward.³ Under an act authorizing a town to issue bonds to secure bounty money, and imposing on the supervisors the duty of levying a tax for their payment, it has been held that a *bona fide* holder of such bonds might maintain an action thereon against the town instead of applying for a *mandamus* against the supervisors to levy the tax.⁴ It seems that the *mandamus* would not lie, as there was a clear legal remedy.⁵ There was formerly some doubt as to the rights of creditors of a town or county to maintain a common-law action for the recovery of their claims; but since the legislatures have so largely authorized the issue of negotiable securities,—such as bonds issued by towns for railroad purposes,—the right of action thereon has been admitted.⁶

§ 809. Vermont decisions.—A town, by force of the Vermont statute which provides that “towns in town meetings may vote such sums of money as they judge necessary for . . . and for other necessary incidental town expenses,” may, under the last clause, build town-houses for the accommodation of its meetings, and for its municipal offices, and lay taxes for such purposes; may provide therefor such conveniences and improvements as prudent people customarily employ in building—as steam-heating and the introduction of water; and though it has no right as a primary purpose to erect buildings to rent, it may fit up rooms for rent, as an expense incidental to the building of a town hall, and rent part

¹ *People v. Board of Audit of Hempstead*, 4 Hun, 94.

² *Donnelly v. Town of Ossining* (1879), 18 Hun, 352.

³ *Att’y’s-Gen’l Opinions*, 1796–1872, p. 448.

⁴ *Marsh v. Town of Little Valley*, 64 N. Y. 112, affirming 1 Hun, 554. See, also, *Brown v. Town of Canton*, 4 Lans. (N. Y.) 409; *Hathaway v. Town*

of Homer, 5 Lans. (N. Y.) 267; *Northrup v. Town of Pittsfield*, 2 N. Y. Super. Ct. (T. & C.) 108.

⁵ *Ex parte Lynch*, 2 Hill, 45; *People v. Hawkins*, 46 N. Y. 9; *Sharp v. Mayor &c.*, 40 Barb. 264.

⁶ *Federgreen v. Town of Fallsburgh*, 25 Hun, 152. See, also, *Thompson v. Perrine*, 103 U. S. 806.

of the building for income to lighten its burdens.¹ Under a warning to vote upon the question of raising money for school purposes, a town meeting cannot vote a tax or authorize the borrowing of money for erecting a high-school building.² It is within the scope of the implied powers of selectmen to protect the interests of their town by the employment of counsel at the charge of the town in road cases where the town agent provides no counsel and makes no objection to the employment of counsel by the selectmen.³ A town agent to defend and prosecute suits has no authority, as such, to bind the town by a promise to pay a certain sum in settlement of a suit against the town to recover for an injury occasioned by the insufficiency of a highway.⁴ The presentation of the account of a town officer to the auditors for examination and adjustment is not by the statutes made a condition precedent to his right to recover against the town for his services.⁵ Selectmen have no authority to draw town orders in their own behalf in settlement of their own private claims against the town, nor are such orders made effectual by the allowance of the town auditor.⁶ Town orders, if in form negotiable, pass by delivery or indorsement, and the assignee may sue thereon in his own name after demand upon the town treasurer.⁷

(b) LIMITATION OF INDEBTEDNESS.

§ 810. Construction of constitutional provisions.—The rule for construing the provisions of constitutions limiting indebtedness of municipal corporations has been stated as follows:—If directed to the legislature, they do not operate as a repeal of the existing powers of those corporations. But if

¹ *Bates v. Bassett*, 60 Vt. 530. The repair of an old, dilapidated hall for proposed expenditure for such purpose rests in the discretion of the

voters and will not be interfered with by the courts, unless it is seen that the discretion is abused by a wilful perversion of the power to illegal ends, or is an abuse of its exercise that demands restraint. It was also held that it was competent for the voters to appropriate money for the

rental purposes.

² *Allen v. Burlington*, 45 Vt. 202.

³ *Burton v. Norwich*, 34 Vt. 345.

And the assent of the town agent may be presumed where he neglects to employ counsel and no dissent is shown.

⁴ *Clay v. Wright*, 44 Vt. 538.

⁵ *Judevine v. Hardwick*, 49 Vt. 180.

⁶ *Davenport v. Johnson*, 49 Vt. 403.

⁷ *Davenport v. Johnson*, 49 Vt. 403.

directed to the municipalities, they have, in themselves, the effect of repealing any inconsistent provisions contained in the charters.¹ The constitutional provisions for submission to voters of questions as to indebtedness as well as those limiting the exercise of the taxing power of municipal corporations in North Carolina have reference only to the contracting of debts, the pledging of municipal faith, the loan of municipal credit, and the levying and collecting of taxes after they became operative, and not to antecedent obligations or the use of the means necessary to their discharge.² If the municipal indebtedness has reached the constitutional limit, a city cannot enter into an agreement to pay a stated sum as rent for a market-house if its annual revenues are insufficient, over and above the interest of its indebtedness and the ordinary expenses of the city, to meet the rent proposed to be paid.³ Under the provision in the constitution of Missouri that "no county . . . shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year," a county warrant issued in payment for books bought by a county clerk which he is required to provide by statute is void, if at the time of its issuance the revenue for that year has already been consumed.⁴ In an action

¹ *List v. Wheeling*, 7 West Va. 501.

² *Street v. Comm'rs*, 70 N. C. 644. See, also, *Brothers v. Comm'rs*, 70 N. C. 726. As to the rules for computing indebtedness, see *Waxahachie v. Brown*, 67 Tex. 519; s. c., 17 Am. & Eng. Corp. Cas. 348; *Durant v. Iowa County*, Woolw. 69; *Culbertson v. Fulton*, 127 Ill. 30; s. c., 18 N. E. Rep. 781; *Wilkinson v. Van Orman*, 70 Iowa, 230; *People v. Hamill* (Ill.), 22 Am. & Eng. Corp. Cas. 39; *Potter v. Douglas County*, 87 Mo. 239; s. c., 13 Am. & Eng. Corp. Cas. 656; *Grant County v. Lake County*, 17 Oregon, 453; s. c., 21 Pac. Rep. 447.

³ *Appeal of City of Erie*, 91 Pa. St. 398. Where the limit of indebtedness has been reached, contracts have been held invalid as creating unauthorized debts; in *French v. Bur-*

lington, 42 Iowa, 614, for grading streets; in *Hebard v. Ashland County*, 55 Wis. 145, by a county for the building of a court-house; in *People v. Johnson*, 6 Cal. 499, for the construction of a wagon road; in *Book v. Earl*, 87 Mo. 246, for remodeling and building additions to a court-house. In *Baltimore v. Gill*, 31 Md. 375, a transaction by which the city pledged railroad stock belonging to it as security for an advance was held, notwithstanding the lender stipulated to look for its payment only to the stock pledged, and the city was not to be responsible for any deficit, to be the incurring of a debt.

⁴ *Barnard v. Knox County* (Mo.), 16 S. W. Rep. 917, overruling *Potter v. Douglas County*, 87 Mo. 240. The

against a county on warrants given in satisfaction of a judgment, an answer which alleges that at the time the judgment was rendered the county debt exceeded the constitutional limit, without stating that such debt exceeded the limit at the time of making the contract on which the judgment was rendered, has been held demurrable.¹ The constitution of Nebraska provides that county authorities shall never assess taxes, the aggregate of which shall exceed a certain limit, except for the payment of indebtedness existing at the adoption of the constitution, unless authorized by a vote, etc. It has been held that in determining whether a proposed levy of taxes will exceed the constitutional limit, taxes to provide for bonded indebtedness contracted before the adoption of the constitution for internal improvements were not to be considered.² Refunding bonds issued by a county for the purpose of taking up a prior valid indebtedness of the county are not rendered invalid by the fact that they exceed the constitutional limitation on the indebtedness of counties and other municipalities.³

§ 811. Rulings of the United States Supreme Court.— In a case holding that the bonds issued were in excess of the amount that could be legally issued, and that the recitals in the bond were not sufficient to estop the municipality from pleading a want of authority to issue them, the United States Supreme Court said :— “ As, therefore, neither the constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their existing indebtedness, it would seem that if the bonds in question had contained recitals which upon any fair construction amounted to a representation on the part of the constituted authorities of the city that the requirements of the constitution were met,— that is, that the city’s indebtedness increased by the amount of the bonds in question was

reason for this is that a debt of that kind is as much within the constitutional prohibition as a debt contracted for any other purpose by the county court.

¹ *Wilder v. Board*, 41 Fed. Rep. 512.

² *Bonnell v. County of Nuckolls*, 49 N. W. Rep. 225, affirming *Bonnell v. County of Nuckolls*, 43 N. W. Rep. 1145. See, also, *Baird v. Todd*, 27 Neb. 782.

³ *Ætna Life Ins. Co. v. Lyon Co.*, 44 Fed. Rep. 329.

within the constitutional limit,—then the city under the decisions of this court might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds.” And again:—“Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated in any form that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred [to issue these bonds] to those municipal corporations whose indebtedness did not at the time exceed the constitutional limit, there would have been ground for holding that the city could not as against the plaintiff dispute the fair inference to be drawn from such recital or statement as to the extent of its existing indebtedness.”¹ The prohibition in the Illinois constitution has been construed by this court, and Justice Miller said of the powers of a municipality under it:—“It shall not become indebted—shall not incur any pecuniary liability. It shall not do this in any manner: neither by bonds nor notes, nor by express or implied promises. Nor shall it be done for any purpose, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt in any manner or for any purpose whatever. If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law.”² Of the prohibition in the Nebraska constitution Matthews, Justice, said:—“We regard the entire section as a prohibition upon the municipal bodies enumerated in the manner of creating and increasing the public debts, by express and positive limitations upon the legislative power itself.”³

¹ *Buchanan v. Litchfield* (1880), 102 U. S. 278, 292. As to estoppel of a county by recitals in bonds as to the constitutional limitation of indebtedness not having been exceeded, see *Town of Coloma v. Eaves*, 92 U. S. 484; *Town of Venice v. Murdock*, 92 U. S. 494; *Marcy v. Township of Oswego*, 92 U. S. 637; *Wilson v. Salamanca Tp.*, 99 U. S. 499; *Northern*

Bank v. Porter Tp., 110 U. S. 608; s. c., 4 S. Ct. Rep. 254.

² *Litchfield v. Ballou*, 114 U. S. 190, 192, 193; s. c., 5 S. Ct. Rep. 820.

³ *Dixon County v. Field*, 111 U. S. 83; s. c., 5 S. Ct. Rep. 315. On pages 95 and 320 the court said as to recitals in bonds:—“No recital involving the amount of the assessed valuation of the property to be taxed for

§ 812. **Rulings in California.**—The constitution of California provides that no county shall incur any liability or indebtedness, exceeding in any year its annual income, without a two-thirds vote of the electors. The county government act provides that claims shall be paid according to priority of presentation. The petitioner had a warrant issued on a valid claim. There was money enough in the fund on which it was drawn to pay it and all other warrants on claims accruing during that fiscal year. The treasurer refused to pay it because there were not funds enough for it and outstanding warrants for former years previously presented. It was held that the income of each year must be used to pay the debts of that year, and that the provision in the county government act governed as to the warrants of any given year.¹ Under the same provision of the constitution, and another section of the county government act, which provides that the board of supervisors shall not allow, nor the auditor or treasurer pay, any such indebtedness, a petition for a writ of mandate to enforce the payment of a claim for supplies furnished said county, which had been ordered paid by the board, has been held to be defective where it failed to show that the debt was ordered paid out of funds for the fiscal year in which the supplies were furnished and the claim filed.² A statute of California provides that no county officer shall pay in any month demands against the treasury exceeding one-twelfth of the amount allowed for the year. The board of supervisors of a

the payment of the bonds can take the place of the assessment itself, for it is the amount as fixed by reference to that record that is made by the constitution the standard for measuring the limit of municipal power." See, also, *Lake County v. Rollins*, 130 U. S. 662; s. c., 9 S. Ct. Rep. 651, in which the court held that the provision in the constitution of Colorado limited the power of a county to contract debts for any purpose whatever. In *Lake County v. Graham*, 130 U. S. 574; s. c., 9 S. Ct. Rep. 654, they held the county not estopped by certain recitals in the bonds. *Lamar, Justice*,

said on p. 680 and p. 655:—"In this case the constitution charges each purchaser with knowledge of the fact that as to all counties whose assessed valuation equals \$1,000,000 there is a maximum limit beyond which those counties can incur no further indebtedness under any possible conditions, provided that in calculating that limit debts contracted before the adoption of the constitution are not to be counted."

¹ *Shaw v. Statler*, 74 Cal. 258; s. c., 15 Pac. Rep. 833.

² *Schwartz v. Wilson*, 75 Cal. 502; s. c., 17 Pac. Rep. 449.

county limited the expense of the county clerk's office to \$72,000 per year. The auditor refused to audit the bills of said office for a certain month because they aggregated \$8,000. These bills included salaries fixed by law. On *mandamus* to compel the audit, the auditor based his answer on the constitutional provision that no county shall incur any indebtedness exceeding in any one year the income and revenue provided for it for such year, without the assent of two-thirds of the electors. It was held that the amount fixed by the board was not the limit of the revenue of the county clerk's office for salaries fixed by law, they being payable out of the general fund, and, in the absence of any showing that the general fund would be exhausted thereby, payment could not be excused by the prohibition in the constitution.¹ An over-issue of bonds under a statute authorizing an issue "not to exceed in all one hundred and fifteen thousand dollars," the numbers, dates and amounts to be recorded, has been held invalid.²

§ 813. Rulings in Colorado.—The limitation of indebtedness by the constitution of Colorado that "the aggregate amount of indebtedness of any county for all purposes shall not at any time exceed twice the amount above herein limited" has been held not confined to debts by loan.³ A county which has reached the constitutional limit of indebtedness may constitutionally make assignments of the annual revenue accruing from taxes levied but uncollected for the current year, provided such assignments are not in excess of the amount covered by the annual levy for the year in which such assignment is made, and the warrant or instrument of assignment is expressly made payable out of the incoming revenue for the current year, and is an assignment *pro tanto*, without recourse by the county, of such fund.⁴ The decision of the Supreme Court of Colorado that, when a county has reached the constitutional limit of indebtedness, a debt for the statutory fee of an officer, or a statutory liability in connection

¹ Welch v. Strother, 74 Cal. 413; s. c., 16 Pac. Rep. 22.

³ Rollins v. Lake County, 34 Fed. Rep. 845, following People v. May, 9 Colo. 80; s. c., 10 Pac. Rep. 641.

² Sutro v. Rhodes (1890), 92 Cal. 117; s. c., 28 Pac. Rep. 98, following Sutro v. Pettit, 74 Cal. 332; s. c., 16 Pac. Rep. 7.

⁴ People v. May, (1885), 9 Colo. 404; s. c., 12 Pac. Rep. 838.

with any other municipal expense, is as much within the constitutional inhibition as any contract directly entered into by the county commissioners,¹ was overruled by the United States circuit court, which held that warrants issued in payment of compulsory obligations, viz., fees of witnesses, jurors, constables, sheriffs, and the like, are not within the provision of the constitution limiting county indebtedness.² But the State court adhered to its position and again held the provision in the constitution to be a limitation of indebtedness, whatever its form, including county warrants and debts contracted under the direct authority of the legislature and to differ from the constitution of Missouri, which limits taxation as well as indebtedness.³ Where county bonds are issued in excess of the constitutional limit of indebtedness, a recital in the bonds that they are issued by virtue of a legislative act which recites the constitutional limitation, and that all the provisions of such act have been fully complied with, does not estop the county from denying the validity of the bonds.⁴

§ 814. Rulings in Illinois.—The constitution of Illinois forbids municipal corporations to become indebted, in any manner or for any purpose, to an amount exceeding five per centum on the value of the taxable property therein. A city indebted beyond the constitutional limit contracted for street lighting at a certain price, payable monthly in warrants on the fund appropriated for that purpose. It was held that warrants drawn on the treasury for gas furnished before the levy of the tax were illegal; but otherwise as to gas furnished after the levy, the city having a right to pay for it at the contract price.⁵ Under the same provisions a contract by a city, whose indebtedness exceeded such limit, to pay, in monthly instalments, for water to be furnished for fire purposes, has been held to be void.⁶ And where no fraud or deceit was practiced by the city to induce plaintiff to enter into the contract, a refusal by the city to pay for the water, followed by

¹ *People v. May*, 9 Colo. 404.

⁴ *Sutliff v. Lake County*, 47 Fed.

² *Rollins v. Lake County*, 34 Fed. Rep. 106.

Rep. 845.

⁵ *City of East St. Louis v. Flannigan*, 26 Ill. App. 449.

³ *People v. May* (1886), 9 Colo. 414; s. c., 15 Pac. Rep. 36.

⁶ *Prince v. City of Quincy*, 128 Ill. 443; s. c., 21 N. E. Rep. 768.

use of the water as before, does not constitute a substantive, actionable tort.¹ But the constitution of Illinois, which limits the extent of municipal indebtedness, does not render invalid the annexation of one municipality to another, pursuant to the statutes of the State, though the indebtedness of one or both of them exceeds the constitutional limit.² A statute of Illinois provides that, before incurring an indebtedness, a city shall provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal within twenty years. It has been held that an ordinance providing for the acquisition of land for the purpose of a cemetery, and appropriating the principal and interest of the lands issued thereunder, to be annually assessed and collected in yearly parts, and setting out the amount to be collected each year, is sufficient under the statute.³ The salary of a health officer is an indebtedness within the meaning of the constitution of Illinois fixing the limit of indebtedness which may be incurred by a city.⁴ But where the price of fire hydrants which a city agreed to purchase from a water-works company was to be paid in annual instalments during a period of twenty-one years, the fact that the entire purchase price exceeded the city's limit

¹ *Prince v. City of Quincy*, 128 Ill. 443; s. c., 21 N. E. Rep. 768.

² *True v. Davis*, 133 Ill. 522; s. c., 22 N. E. Rep. 410. The limitation in the special charter of a city in Illinois as to the extent of municipal taxation has been held to have been repealed by the "Act authorizing cities, incorporated towns and villages to construct and maintain water-works," the "Act in relation to the rate of taxation in cities, villages and incorporated towns," and the "Act in relation to the levy and collection of taxes for sewerage and water-works in cities." *Culbertson v. City of Fulton*, 127 Ill. 30; s. c., 18 N. E. Rep. 781. In the same case it was held that under the constitutional provision forbidding cities from becoming indebted to an amount ex-

ceeding five per cent. on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of the indebtedness, the constitutionality of a debt incurred August 15, 1887, by a city, the assessment of whose taxable property for the year 1887 was not fixed by the State board of equalization until October 1, 1887, was to be determined by reference to the assessment of 1886, and that a contract creating a debt in excess of the limit is only void as to the excess, and a tax for the payment of the same will only be enjoined to that extent.

³ *Dehm v. City of Havana*, 28 Ill. App. 520.

⁴ *Norton v. City of East St. Louis*, 36 Ill. App. 171.

of indebtedness has been held not to render the contract void.¹

§ 815. **Rulings in Indiana.**—A contract between a city and a private corporation, whereby the latter agrees to supply the city with light for a specified number of years at a certain price per year, does not create a debt for the sum of all the annual payments within the meaning of the statutory limitation on municipal indebtedness, since the payment for each year does not become obligatory till the services for that year have been rendered.² Bonds or certificates for street improvements have been held valid as not creating an indebtedness within the inhibition of the constitution of Indiana limiting municipal indebtedness, on the ground that they were payable out of the special improvement fund to be accumulated from assessments made against the property benefited, and hence no indebtedness arose against the city.³ But the character of the bonds and that they are payable out of a special street improvement fund should appear upon the face of the paper, thus making it apparent to the world that they are not regarded as the obligations of the corporation.⁴ The constitution of Indiana limiting municipal indebtedness

¹ *Carlyle Water, Light & Power Co. v. City of Carlyle*, 31 Ill. App. 325. The court said: — “There was no present indebtedness by the contract when it was made; and no appropriation was necessary at the time of making, or before entering into, the contract.”

² *Crowder v. Town of Sullivan* (1891), 128 Ind. 486; s. c., 28 N. E. Rep. 94; *City of New Albany v. McCulloch*, 127 Ind. 500; *City of East St. Louis v. East St. Louis &c. Co.*, 98 Ill. 415; *Appeal of City of Erie*, 91 Pa. St. 398; *Grant v. City of Davenport*, 36 Iowa, 396.

³ *Quill v. City of Indianapolis* (1890), 124 Ind. 292. The court held that it is essential to the idea of a debt that an obligation should have arisen out of a contract express or implied, which entitles the holder thereof un-

conditionally to receive from the promisor a sum of money which the latter is under a legal or moral duty to pay without regard to any future contingency. See, also, *State v. Hawes*, 112 Ind. 323; *The Mayor &c. v. Gill*, 31 Md. 375; *Sackett v. City of New Albany*, 88 Ind. 473, in which the court defined “indebtedness” in this connection to “mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligations imposed by the agreement.” As to what do not come within the inhibition, *Strieb v. Cox*, 111 Ind. 299; *Board v. Hill*, 115 Ind. 316; *City of Valparaiso v. Gardner*, 97 Ind. 1.

⁴ *Quill v. City of Indianapolis* (1890), 124 Ind. 292.

furnishes no defense to an action upon a contract by a municipality to pay for services to be rendered in effecting a compromise of its debt.¹

§ 816. **Rulings under the Iowa constitution.**—The bonds issued by a school district in the case cited in the note were held not to be enforceable, as they were in violation of the constitution of Iowa so far as it limited the indebtedness of political or municipal corporations.* The payment of instalments of interest will not have the effect of ratifying bonds issued beyond the constitutional limit.³ The Supreme Court of Iowa have held their constitutional restriction to include not only municipal bonds, but all forms of indebtedness, except warrants for money actually in the treasury, and perhaps contracts for ordinary expenses within the limits of current revenues.⁴ The purchaser of bonds issued by a school district is bound to take notice of the limitation in the constitution of Iowa which restricts the indebtedness of political and municipal corporations to five per cent. of the taxable value of the

¹ *City of Logansport v. Dykeman*, 116 Ind. 15; s. c., 17 N. E. Rep. 587.

² *Dist. Tp. of Doon v. Cummins* (U. S., 1892), 12 S. Ct. Rep. 220. The statute under which these bonds for funding indebtedness were issued authorized the treasurer of such district "to sell the bonds . . . at not less than their par value and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par." The court said: "The second alternative . . . might be consistent with the constitution; but under the first alternative . . . it is evident that if (as in the case at bar) new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and if new bonds equal in amount to the old ones are so issued at one time, is doubled, and

that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged."

³ *District Township of Doon v. Cummins* (1892), 12 S. Ct. Rep. 220. See, also, *Marsh v. Fulton County*, 10 Wall. 676; *Association v. Topeka*, 20 Wall. 655; *Daviess County v. Dickinson*, 117 U. S. 657; s. c., 6 S. Ct. Rep. 897; *Norton v. Shelby Co.*, 118 U. S. 425, 451; s. c., 6 S. Ct. Rep. 1121.

⁴ *Scott v. Davenport*, 34 Iowa, 208; *McPherson v. Foster*, 43 Iowa, 48; *Mosher v. School District*, 44 Iowa, 122; *Council Bluffs v. Stewart*, 51 Iowa, 385; s. c., 1 N. W. Rep. 628; *Kane v. School Dist. (Iowa)*, 47 N. W. Rep. 1076. School districts have been held to be political or municipal corporations within the meaning of the constitution in *Winspear v. Holman Tp.*, 37 Iowa, 542; *Mosher v. School Dist.*, *supra*, and *Kane v. School Dist.*, *supra*.

property within their limits, and of the official assessment of the taxable property within the district.¹ A warrant issued by way of compromise of back taxes by the terms of which the city was to redeem property from a tax sale and the taxpayers were to pay to the city an agreed sum of money on account of back taxes has been held not to be void because when it was issued the city was indebted in excess of the constitutional limit.²

§ 817. The same subject continued.—A contract by which a contractor agrees to construct a sewer and to accept in payment certificates assessing the benefits against the property benefited does not create a debt within the constitutional inhibition, and will be sustained although a city has reached the constitutional limitation of indebtedness.³ An ordinance which authorized the construction of water-works within a city and provided that the city should have the right, when its financial condition might permit, to purchase the works, has been held not an incurring of indebtedness.⁴ Generally

¹ *Nesbit v. Independent District of Riverside* (U. S., 1892), 12 S. Ct. Rep. 746, affirming 25 Fed. Rep. 635.

² *Hintrager v. Richter* (Iowa, 1892), 52 N. W. Rep. 188. The court said, as the city received from the tax-payers more money than the amount for which the warrant was issued, "its indebtedness must have been reduced rather than increased."

³ *Davis v. Des Moines*, 71 Iowa, 500. In *Dively v. Cedar Falls*, 27 Iowa, 227, it was held that the obligation under a contract on the part of the city to pay for work when and as it should be performed in the future did not constitute an indebtedness within the meaning of the inhibition of the constitution until the actual performance of the work. In *Bartle v. Des Moines*, 38 Iowa, 414, it was held that a corporation could not escape liability by pleading that its indebtedness had already reached the constitutional limit, in an action for

damages on account of injury caused by negligence in the construction and maintenance of the gutters of its streets; nor as held in *Rice v. Des Moines*, 40 Iowa, 638, in an action for damages caused by a defective sidewalk; nor as held in *Thomas v. Burlington*, 69 Iowa, 140, in an action to recover back an illegal tax which had been paid under protest. In *National State Bank v. Independent District of Marshall*, 39 Iowa, 490, an order drawn upon a treasurer of a municipality which was already indebted in excess of the constitutional limit was held to be invalid in the hands of the original payee, and a *bona fide* holder would take it subject to all the equities existing against the payee, as it is not a negotiable paper. Nor would the assignment of such an order entitle the assignee to recover in an action.

⁴ *Burlington Water Co. v. Woodward*, 49 Iowa, 58.

only that part of the indebtedness incurred which exceeds the constitutional limitation will be held to be void.¹ But if the indebtedness would be invalid in case no part of it were within the limit, if part of it be within the part without is not cured of illegality.²

§ 818. Rulings under the Oregon and Washington constitutions.—An ordinance of a municipal corporation which provides for the payment of money by a town without providing the means wherewith to make such payment creates an indebtedness against such corporation, within the meaning of the constitution of Oregon, which provides that the legislature in incorporating towns shall restrict their power to create debts.³ The provision of the constitution of Washington that no county shall become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county without the assent of three-fifths of the voters therein does not authorize county commissioners to incur an indebtedness up to the one and one-half per cent. in addition to any indebtedness which may have been incurred before such provision took effect.⁴ Nor does it authorize them to submit to the people the question of validating any purported indebtedness they had attempted to incur in excess of the limitation.⁵ It has been held that where a city has done an act (as, for instance, incurring a liability in excess of the amount named as a limitation of municipal indebtedness) beyond its statutory powers, but within the powers which it is competent for the legislature to confer upon it, the act may be validated by a curative act.⁶

§ 819. Rulings under Texas laws.—The section in the laws of Texas authorizing the issue of bonds to build a courthouse which declares that the county shall not issue a larger

¹ *McPherson v. Foster*, 43 Iowa, 48.

² *McPherson v. Foster*, 43 Iowa, 48, holding also that the express assent of all the inhabitants of a municipality will not validate bonds issued in excess of the constitutional limit.

³ *Murphy v. East Portland*, 42 Fed. Rep. 308.

⁴ *Rehnke v. Goodwin* (Wash.), 27 Pac. Rep. 473.

⁵ *Rehnke v. Goodwin* (Wash.), 27 Pac. Rep. 473.

⁶ *Baker v. City of Seattle* (Wash.), 27 Pac. Rep. 462.

number of bonds than can be liquidated in ten years by an annual tax of one-fourth of one per cent. upon the property in the county has been held a limitation upon the section which authorizes the issue of such bonds "in such amount as may be necessary."¹ And bonds issued in excess of the amount authorized by the provision as to tax are void and cannot be enforced even by a *bona fide* purchaser.² And the purchaser of such bonds are chargeable with notice of the official assessment rolls of taxable property which are public records, and cannot claim to be innocent purchasers.³ That part of the constitution of Texas which provides that no debt shall be created by a city unless at the same time provision be made for taxation for its payment applies to all cities alike, though other parts of the section are expressly limited to cities of more than ten thousand inhabitants.⁴

§ 820. **Rulings in West Virginia.**—Where there is a constitutional limit of indebtedness of a city, and it is indebted up to that limit, it cannot carry on its operations upon credit in any manner or for any purpose, but must pay during the current year with funds in hand or with funds already legally levied.⁵ And any tax-payer, resident and voter of a city may

¹ Francis v. Howard County, 50 Fed. Rep. 44; following Russell v. Cage, 66 Tex. 432; s. c., 1 S. W. Rep. 270, and Nolan County v. State (Tex.), 17 S. W. Rep. 826.

² Francis v. Howard County, 50 Fed. Rep. 44.

³ Francis v. Howard County, 50 Fed. Rep. 44.

⁴ City of Terrell v. Dissaint (Tex.), 9 S. W. Rep. 593. And it was also held that a note for \$1,000, given by a city in payment for water-works material, and payable with interest two years after date, was a debt within the meaning of the constitution, forbidding cities to contract debts without at the same time providing for taxation for their payment.

⁵ Spilman v. City of Parkersburg, 35 West Va. 605; s. c., 14 S. E. Rep.

279, holding further that a city could not increase its indebtedness beyond the constitutional limit by contracting for an electric apparatus and plant; and, such indebtedness being forbidden, the contract out of which it arose, although executory, was also forbidden. The end aimed at, being prohibited, carries with it the prohibition of the means directly and appropriately designed and adapted for its accomplishment. See, also, List v. City of Wheeling, 7 West Va. 501; Brannon v. County Court, 33 West Va. 789; s. c., 11 S. E. Rep. 34; County Court v. Boreman (West Va.), 12 S. E. Rep. 490; East St. Louis v. People, 124 Ill. 655; s. c., 23 Am. & Eng. Corp. Cas. 408; Gould v. Paris, 68 Tex. 511; s. c., 17 Am. & Eng. Corp. Cas. 340; Scott v. Davenport,

sue on behalf of himself and all other tax-payers to enjoin the creation of any indebtedness by such city in excess of the constitutional limit.¹

§ 821. **Special statutory provisions.**—When the charter of a municipal corporation authorizes a contract to be made by the corporate body in a certain mode, its officers and agents cannot bind it in any other manner.² Where a statute makes no contract binding on a city unless an appropriation sufficient to pay the same be previously made by the council, it has been held that when an appropriation was made sufficient at the time to pay the contract in full, a subsequent diversion of the same to other objects by the city left it liable as though such diversion had not been made.³ Nor does such a provision repeal the obligation imposed upon councils to annually raise the amount required by commissioners for the erection of public buildings, and councils are bound to levy the tax or otherwise raise the amount.⁴ If an appropriation has been made under such a provision in the charter of a city for a specific purpose, and the proper department incurs liabilities sufficient to exhaust it, it can make no further contracts binding on the city for that purpose.⁵ A municipal corporation may be bound upon implied contracts made by its agents and to be deduced from corporate acts without a vote of the governing body, provided the contract is within the scope of the corporate powers and is not one which the charter or law

34 Iowa, 208. The Supreme Court of West Virginia considered that the safe and sound construction of this constitutional inhibition which West Virginia modeled after that in the Illinois constitution of 1870 was the rule laid down in *Prince v. City of Quincy* (1889), 128 Ill. 443; s. c., 21 N. E. Rep. 768, as follows:—"The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to carry on their corporate operations while so indebted upon the cash system, and not upon credit to any extent or for any purpose."

¹ *Spilman v. City of Parkersburg*, 35 West Va. 605; s. c., 14 S. E. Rep. 279.

² *Keeney v. Jersey City*, 47 N. J. Law, 449; s. c., 11 Am. & Eng. Corp. Cas. 309.

³ *McGlue v. Philadelphia*, 10 Phil. 348.

⁴ *Perkins v. Slack*, 86 Pa. St. 270. See, also, *Latham's Appeal*, 80 Pa. St. 465; *Donovan v. Mayor &c. of New York*, 44 Barb. 180.

⁵ *Kingsland v. Mayor &c.*, 5 Daly, 448. See, also, *People v. Kelly*, 5 Abb. N. C. 383, 468; s. c., 76 N. Y. 475.

governing the corporation requires to be made in a particular way or manner.¹

§ 822. The same subject continued.— It has been held that the provisions of the charter of a city prohibiting it from entering into a contract for a work or improvement at a price exceeding \$500 “until the assessment therefor has been confirmed” did not apply to the board of park commissioners, but only had reference to contracts made by the regular officers of the municipal government and not to those made by its separate independent departments.² Where the power of the commissioners of public works to incur liability for materials used in the construction of sewers was limited to \$100,000, it was held that a contract for sewer materials exceeding that amount was not binding on the city, at least for the excess. But a contractor who had in good faith furnished the materials which had been received by the city could recover therefor where the legislature had subsequently validated the contract.³ It has been held that a statute prohibiting municipal corporations from contracting any debt or pecuniary liability without adopting an ordinance and providing in it the means of paying principal and interest of the debt contracted was not applicable to a demand for gas supplied to a city.⁴ Under the Georgia act limiting the power of a city to levy taxes to taxes imposed for the purpose of defraying “ordinary cur-

¹ *Kramrath v. City of Albany* (1891), 127 N. Y. 575. And a corporation like an individual is liable upon *quantum meruit*, when it has enjoyed the benefit of the work performed or goods purchased when no statute forbids or limits its power to make a contract therefor. *Peterson v. Mayor &c.*, 17 N. Y. 449; *Harlem Gaslight Co. v. Mayor &c.*, 3 Robt. 124, affirmed in 83 N. Y. 309; *Nelson v. Mayor &c.*, 63 N. Y. 535; *McCloskey v. Mayor &c.*, 7 Hun, 472.

² *Bork v. City of Buffalo* (1891), 127 N. Y. 64; s. c., 37 N. Y. St. Rep. 232.

³ *Nelson v. Mayor &c. of N. Y.* (1875), 63 N. Y. 575; reversing s. c., 5 Hun, 190. Followed in *People v.*

Denison, 19 Hun, 137, 149; affirmed in 80 N. Y. 656; distinguished in *Bigler v. Mayor*, 5 Abb. N. C. 51, 70; limited in *McDonald v. Mayor*, 68 N. Y. 23; s. c., 23 Am. Rep. 144; affirming 4 Sup. Ct. (T. & C.) 177; *Smith v. City of Newburg*, 77 N. Y. 130, 137.

⁴ *Laycock v. Baton Rouge*, 35 La. Ann. 475, for the reason that this demand was one of the current expenses of the city and payable out of the current revenues of the year in which the liability was contracted, As to different rulings and modifications, see *Prince v. Quincy*, 105 Ill. 138; s. c., 2 Am. & Eng. Corp. Cas. 66; *Springfield v. Edwards*, 84 Ill. 626; *Sackett v. New Albany*, 88 Ind. 473.

rent expenses," expenses incurred in erecting and fitting up necessary municipal offices, such as police headquarters, council chamber, court room, clerk's office, town hall and engine-house, have been held to be included therein.¹

§ 823. **Indebtedness for water and lights.**—The establishment by the city of a water department for the supply of water to the city and its inhabitants is a "city purpose," within the meaning of a constitutional provision that "no county, city, town or village shall . . . be allowed to incur any indebtedness except for county, city, town or village purposes."² A section of the act "to establish and maintain a water department in and for the city of Syracuse" provided for the issue of bonds by the city of Syracuse in aid of the establishment and maintenance of a water department, and made the bonds payable more than twenty years from the date of their issue, but provided for no sinking fund for their retirement at maturity. It was held that such section was not in violation of the constitution of New York, which provides that "no county containing a city of over one hundred thousand inhabitants, or any such city, shall be allowed to become indebted . . . to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of the real estate subject to taxation," and that such section "shall not be construed to prevent the issue of bonds to provide for the supply of water, but the terms of" such bonds "shall not exceed twenty years, and a sinking fund shall be created on the issuing of such bonds for their redemption," it not affirmatively appearing that Syracuse contained more than one hundred thousand inhabitants and that its existing indebtedness exceeded ten per centum of the as-

¹ *Rome v. McWilliams*, 67 Ga. 106. But in *Hudson v. Marietta*, 64 Ga. 286, it was held that an election under the law was necessary to authorize a city to incur a debt under the provisions of the constitution of that State in exchanging an old fire-engine for a new one. And in *Spann v. Webster Co. Comm'rs*, 64 Ga. 498, it was held that a vote of citizens

was necessary to authorize the purchase of iron safes for the county. The levy of a tax for expenses of jails was, however, held to be valid, being equivalent to a levy to maintain and support prisoners, which was in the power of the commissioners.

² *Comstock v. City of Syracuse*, 5 N. Y. Supl. 874.

sessed valuation of its real estate subject to taxation.¹ The construction and operation by a city of a plant for the supply of electric light to the city and its inhabitants is a city purpose, within the meaning of the constitution of New York, prohibiting cities from incurring indebtedness except for city purposes.² The act of a town in authorizing its selectmen to make a contract with a water company for a supply of water, for fire and other purposes, for a term of years at a certain sum per year to be paid annually, the payments to be made out of moneys annually granted by the town and raised by taxation, is not the incurring of a debt within the meaning of the statute of Massachusetts relative to municipal indebtedness, as the statute does not apply to contracts for current expenses payable out of current revenues.³ Where the mayor and council of a town have the power to contract an annual indebtedness for lighting the town, they will not be enjoined, under the provision in the constitution of Georgia that a debt cannot be incurred by a town without the approval of two-thirds of the voters, from carrying out a ten-years' contract for lighting, by the terms of which \$2,000 is to be paid annually, so long as such payments are made as they become due.⁴ A debt arising from a breach of contract to pay cash is not within the constitutional provisions of the State of Georgia limiting indebtedness.⁵

§ 824. Effect of exceeding the limit.—Where bonds are issued by a court at different times to pay for improvements, under an act limiting the total amount to be issued, the fact that bonds are issued beyond the limit does not invalidate such bonds as were issued and sold before the limit was reached.⁶ In an action on such bonds the petition need not allege that there was not an over-issue, it being a matter of defense if there was.⁷ And even if it were necessary to al-

¹ *Comstock v. City of Syracuse*, 5 N. Y. Supl. 874.

² *Hequembourg v. City of Dunkirk*, 2 N. Y. Supl. 447.

³ *Smith v. Dedham*, 144 Mass. 177; s. c., 10 N. E. Rep. 782.

⁴ *Lott v. City of Waycross*, 84 Ga. 681; s. c., 11 S. E. Rep. 558.

⁵ *City of Conyers v. Kirk*, 78 Ga. 480; s. c., 3 S. E. Rep. 442.

⁶ *Catron v. La Fayette County*, 106 Mo. 659; s. c., 17 S. W. Rep. 577.

⁷ *Catron v. La Fayette County*, 106 Mo. 659.

lege that there was not an over-issue, an allegation that the bonds were "duly" issued would be sufficient.¹ Where a district voted to build a school-house to cost not more than \$2,000, and the directors borrowed part of the money necessary and gave an order therefor, and in erecting the house paid more than the amount authorized, it was held, in an action upon the order, that where the money was used in paying an indebtedness incurred before the authorized limit was reached the district was liable.² A contract with a water company to pay a specified annual sum for water for public uses for an indefinite period is within the meaning of a law limiting indebtedness.³ It has been held that a contract by which a city, in a Territory whose assessed valuation was \$5,000,000, agreed to pay \$15,000 a year for twenty years, could not be considered as falling within an act of congress prohibiting municipal corporations in the Territories becoming indebted to an amount exceeding four per cent. of the valuation.⁴ Where the indebtedness of a city incurred under a contract already exceeds the constitutional limit, and the fund appropriated for the purpose of the contract is exhausted, damages cannot be recovered for a breach of the contract by the city.⁵

§ 825. Remedies of tax-payers against increase of debt.—Tax-payers have been held to have sufficient interest to enable them to maintain suits for injunction of the municipal authorities against entering into contracts which will create indebtedness in excess of the constitutional limit.⁶ The officers of a

¹ *Catron v. La Fayette County*, 106 Mo. 659.

² *Austin v. Dist. Tp. of Colony*, 51 Iowa, 102; s. c., 49 N. W. Rep. 1051.

³ *State v. Atlantic City*, 49 N. J. Law, 558; s. c., 9 Atl. Rep. 759.

⁴ *Davenport v. Kleinschmidt*, 8 Mont. 467; s. c., 13 Pac. Rep. 249.

⁵ *Dhrew v. City of Altoona (Pa.)*, 15 Atl. Rep. 636.

⁶ *Springfield v. Edwards*, 84 Ill. 626. See, also, *Valparaiso v. Garden*, 97 Ind. 1. But the ruling in *Searle v. Abraham*, 73 Iowa, 507, was that they

must show that they would sustain injury by the contemplated action of the municipality. *Davenport v. Kleinschmidt*, 8 Mont. 467; s. c., 16 Am. & Eng. Corp. Cas. 301, as to injunction against carrying out such contracts. *Wilkinson v. Van Orman*, 70 Iowa, 230, against issuing bonds in excess; and *Howell v. Peoria*, 90 Ill. 104, against levying and collecting a tax for the purpose of paying the indebtedness incurred; and *Richards v. Supervisors*, 66 Iowa, 612, where a taxpayer was held entitled to intervene

city should not be enjoined from issuing lawful warrants on the treasury for lawful purposes, even though a part of the levy of taxes be unlawful and void.¹

and defend in an action against the municipal authorities to compel them to levy a tax for the payment of an indebtedness in excess of the constitutional limit, if the municipal authorities refused to set up the defense. In *East St. Louis v. People*, 6 Ill. App. 76, it was held that the power of a court to grant a writ of *mandamus* to compel a levy of taxes beyond the limit allowed by law was not affected by the fact that the whole of the taxes received by the municipality were absorbed by its necessary current expenses. *East St. Louis v. Board of Trustees*, 6 Ill. App. 130. In *Low v. People*, 87 Ill. 385, it was held that a municipality had no power to make an appropriation for the payment of a contract void as creating a liability in excess of the limit of indebtedness or to levy a tax to pay interest.

¹ *Fuller v. Heath* (1878), 89 Ill. 296,

in which it was held that a warrant drawn on a city treasurer reading: "from the taxes of the year 1878, appropriated and levied for the police department, when received by you, pay — —, or bearer, the sum of \$—, being for services rendered [or for materials furnished], and payable out of the appropriation for said department, and charge the same to the police fund," and adding, "the taxes to be collected for account of this fund are specially appropriated, set apart and pledged to the payment of this and all warrants drawn thereon, and which warrants do not exceed eighty-five per cent. of the appropriation made therefor," did not create any corporate liability and was not an evidence of indebtedness on the part of the city. It was but a transfer of so much of a particular tax when collected.

CHAPTER XXII.

MUNICIPAL FUNDS.

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882. School board orders.

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(a) CARE AND DISBURSEMENT OF FUNDS.

§ 826. Funds appropriated to specific uses.—A California statute provided for a fund in a city treasury to be paid to the owners of property condemned to widen a street as damages to be raised by issuing and sale of bonds and provided for the redemption of these bonds. It was held that the money collected from taxation for the specific purpose of paying coupons attached to these bonds was payable only for their redemption and could not be used to pay damages awarded to property owners.¹ Further that the fact that part of the money collected from the sale of the bonds which should have been used in the payment of damages to property owners was illegally used to pay the interest on the bonds, and that the fact that the part of the money collected from taxes to pay interest was used to redeem some of the bonds did not, by operation of law, pass the money collected from taxation for the payment of coupons to the damage fund, to replace that illegally taken therefrom.² A charter of a city provided that "all moneys arising from taxation, donation or other sources shall be paid to the treasurer of the city, and no appropriation thereof shall be made, except for necessary expenses, and but by a concurring vote of six-eighths of all the councilmen." It was held that the requirement of a six-eighths vote applied only to expenditure outside of the necessary ex-

¹ *Priet v. Reis* (1892), 93 Cal. 85; s. c., 28 Pac. Rep. 798.

² *Priet v. Reis* (1892), 93 Cal. 85; s. c., 28 Pac. Rep. 798, in which case a *mandamus* was refused on the ground that as in California the writ of mandate is issued only to enforce an act especially enjoined by law as

a duty resulting from an office, trust or station, it would not lie to compel the payment of money out of a fund which the law does not allow to be applied to the use sought. Following *Bates v. Porter*, 74 Cal. 224; s. c., 15 Pac. Rep. 732.

penses.¹ Under a charter provision authorizing the board of trustees of a village to organize and establish a fire department and to prescribe the powers and duties of the companies and the members thereof, the trustees have, in the absence of any other provision, power by resolution to direct the payment of the money coming into the hands of the fire department treasurer to the companies of the department in proportion to their maximum membership as fixed by the trustees.²

§ 827. **Custodians of funds.**—A county treasurer having done all required of him by law to entitle him to hold the office cannot be deprived of it by any wilful or unjust refusal of the chairman of the county board and a committee of such board to appraise his official bond as required by the statute.³ Where a defaulting treasurer declines to qualify and waives his statutory time for that purpose, it is the duty of the board of county commissioners to fill the vacancy

¹ Gardner v. City of Newbern, 98 N. C. 228; s. c., 3 S. E. Rep. 500.

² People v. Son (1892), 19 N. Y. Supl. 309. In Trustees v. Rome, 29 Hun, 396, it was held that the treasurer of the fire department (he is an officer of the village) should, under the direction of the trustees of the village or common council of the city, pay over all moneys received or recovered under N. Y. Laws 1875, ch. 465, §§ 1, 2, 3, to the fire department of the city or incorporated village in which the department is located. The mayor and council of a city in Nebraska of the second class drew an order upon the cemetery fund of such city for \$716.66, there being at the time \$1,000 in such fund in the treasury, and applied the proceeds to the payment of lands purchased as an addition to the cemetery, but no appropriation had been previously made concerning such expense. It was held that no act or ratification being proved, the mayor and clerk were liable for the amount of the or-

der under the statute which provides that no expense can be incurred by a city, except in specified cases, unless an appropriation has been made therefor, whether such expense has been ordered by the council or not. City of Blair v. Lantry (Neb.), 31 N. W. Rep. 790.

³ State v. Knight (Wis.), 51 N. W. Rep. 1137, following State v. Dahl, 65 Wis. 510; s. c., 27 N. W. Rep. 343. The court said:—"Neither the county board representing *pro hac vice* the interests of the public, nor the respondent, can now be heard to urge a want of approval of the relator's bond occurring under circumstances establishing presumptively, at least, neglect of official duty on the part of the county board. It was their official duty to attend to the matter of the approval of the bond, and the relator was not bound to coerce the performance of that duty by legal process at the peril of losing his rights."

without demand, and the treasurer must then hand his successor all public moneys, books, records, accounts, papers and documents in his possession appertaining to such office, under the statutes of Dakota relating to delinquent treasurers.¹ Where a board of county commissioners suspend a county treasurer and appoint an acting treasurer, it appearing at the time of such order that the treasurer is a defaulter, the appointment is such a removal of the treasurer as requires him under the Kansas statutes to deliver to the acting county treasurer as his successor all the books, papers and moneys in his hands by virtue of his office.² And such a removed treasurer is not entitled to his salary after the date of his suspension, and the taking possession of the office by the acting treasurer.³ An order of the commissioners' court directing a county treasurer to deposit county funds in a certain bank does not exempt him from liability for their loss through failure of the bank.⁴ Where two banks had made a bond for a county treasurer upon an agreement that he would deposit equally between them the county funds, and the board of county commissioners fail to designate, as the statute requires, a responsible bank as depository, and the treasurer becomes a defaulter, the sureties having obtained an advantage or profit by their agreements with him cannot limit their liability upon the bond because the statute was not complied with by the commissioners.⁵ A county treasurer in Iowa who deposited in a bank money belonging to the county has been held liable therefor upon a failure of such bank, although the county had not provided a safe place to keep the money.⁶ When the county court has provided a fund in the hands of the sheriff, *ex officio* the county treasurer, for the payment of claims against the county, and has caused to be issued and delivered to the creditor an order for his claim in form or effect as provided in the code of West Virginia, and the sheriff, without fault on the part of the court, fails or refuses

¹ *Stutsman County v. Mansfield*, 5 Dak. 78; s. c., 37 N. W. Rep. 304.

² *Loper v. State* (Kan.), 29 Pac. Rep. 687.

³ *Loper v. State* (Kan.), 29 Pac. Rep. 687.

⁴ *McKinney v. Robinson* (Tex.), 19 S. W. Rep. 699.

⁵ *Loper v. State* (Kan.), 29 Pac. Rep. 687.

⁶ *Lowry v. Polk County*, 51 Iowa, 50; s. c., 49 N. W. Rep. 1049.

to pay the order, the creditor's remedy is against the sheriff on his bond as provided by the statute, and not by *mandamus* to compel the county court to levy a tax to pay the same.¹ A county treasurer who receives from his predecessor United States bonds purchased by order of the county and belonging to it is bound to account therefor and for the premiums accruing thereon, and cannot claim as against the county that they were purchased without authority.²

§ 828. **The same subject continued.**— The Texas statute provides that "it shall be the duty of the county treasurer to receive all moneys belonging to the county, from whatever source they may be derived, and to pay and apply the same as required by law, in such manner as the commissioners' court of his county may require and direct." Other provisions require the registration and classification of all claims against counties, and forbid their payment other than as provided by law. It has been held that it was no defense to an action for the proceeds against one who, as agent of the county, had sold certain of its bonds, that he had devoted the proceeds of the bonds before their sale to the payment of the contractor for the erection of the court-house at the request of the county judge, and upon the promise of the latter that the county would reimburse defendant upon final settlement, as the county judge had no authority to bind the county.³ A receiver of public money who has given bond for its safe-keeping is not discharged from liability therefor by the failure of the bank in which he has deposited it.⁴ A township trustee has no right to accept of his predecessor a note in satisfaction of a debt due the township for funds wrongfully appropriated by the latter to his own use while in office, and such debt is not thereby merged in the note so to be affected by a discharge in bankruptcy.⁵ Where funds derived from the sale of bonds of a city in Kansas of the third class are received either by

¹ Ratcliffe v. County Court (West Va.), 14 S. E. Rep. 1004.

² Nixon v. State, 96 Ind. 111.

³ Nolan County v. Simpson, 74 Tex. 218; s. c., 11 S. W. Rep. 1098.

⁴ Nason v. Directors of Poor, 126 Pa.

St. 445; s. c., 24 W. N. C. 60; 17 Atl. Rep. 616. Following Baily v. Commonwealth (Pa.), 10 Atl. Rep. 764.

⁵ Madison Tp. v. Dunkle, 114 Ind. 262; s. c., 16 N. E. Rep. 593.

the city treasurer or other person acting in behalf of the city, the entire amount should, on demand, be paid into the city treasury, and such persons cannot fix their own compensation for services in respect to such funds, or withhold a part of the proceeds as such compensation, but any such claim must be presented to the city council in writing and allowed in the manner prescribed by statute.¹ A city treasurer has no right to apply a surplus in his hands over the yearly appropriations to the payment of debts against the city of prior years, without the direction of the council.² And the city council cannot ratify the action of a city treasurer in paying out city money in a manner not authorized by law.³ The provision of the statute of Dakota, that on going out of office the treasurer shall deliver to his successor all public moneys, books, etc., "in his possession," does not show a legislative intent to limit his liability to that of a bailee.⁴

§ 829. Compensation of treasurers.—The county treasurer is the custodian of the funds paid for school lands by virtue of his office; and under the Minnesota statute which provides that no county treasurer shall receive for his personal services more than the sum named therein, his annual salary is intended as full compensation for his official services, and he should not be permitted to retain the fees and percentage allowed for handling the proceeds of State lands in addition to his salary; but all fees and percentage, as well from that source as others, in excess of the amount provided by that statute for his salary, are to be paid at the end of each year into the revenue fund.⁵ The local acts relating to the compensation of the treasurers of Monroe and Seneca counties, New York, it has been held, were not to be deemed retroactive

¹ *City of Syracuse v. Reed* (Kan., 1891), 26 Pac. Rep. 1043.

² *City of East St. Louis v. Flannigan*, 84 Ill. App. 596.

³ *City of East St. Louis v. Flannigan*, 84 Ill. App. 596.

⁴ *Clay County v. Simonsen* (Dak.), 46 N. W. Rep. 592.

⁵ *Gerken v. County of Sibley*, 39 Minn. 433; s. c., 40 N. W. Rep. 508.

The special Minnesota statute which authorized the county board of Sibley county to repay to the county treasurer the fees for receiving and paying over moneys on account of sales of school land during his term of office is not mandatory, and the question of the validity of such a claim was held to be still open for judicial determination.

and therefore unconstitutional, nor were they objectionable otherwise. The treasurers of those counties may retain commissions on State taxes, but only for the benefit of their counties.¹ It has been held in Arkansas that a county treasurer was entitled to commissions on school funds received from a former treasurer under a statute providing that "the county treasurer shall be allowed as commissions on the aggregate amount of school funds of the county coming into his hands in any one year the rate of two per cent. and no more."² The whole percentage on collections can be claimed by a treasurer whose term of service is less than a year in Minnesota, as the statute giving county treasurers a percentage on collections does not provide that a less amount shall be claimed by a treasurer who holds office for less than a year.³ A county treasurer is not entitled under the Texas statute to commissions on county scrip received for taxes, nor on the amount of bonds issued to contractors to pay for public buildings.⁴

§ 830. **The same subject continued.**—It being the duty of a county treasurer to receive, keep and disburse all money belonging to his county, in respect to which no specific provision is otherwise made, including the proceeds of the sale of county bonds issued to raise money for building a bridge, he is not entitled to extra compensation therefor, though the board of county commissioners had agreed with him to pay it.⁵ Though no specific fee is prescribed for the county treasurer for making searches for delinquent taxes, tax sales, etc., for private persons, and making and certifying abstracts and copies from his records, he is entitled to reasonable fees for these services, and must enter and return them in his fee book as prescribed by the Nebraska statute for "each and every item of fees collected."⁶ Under the Texas statute providing that the county treasurer shall be entitled to commissions not exceeding a certain percentage, to be fixed by the commis-

¹ Seneca County Supervisors v. S. W. Rep. 699; Wharton County v. Allen, 99 N. Y. 532. Ahldag (Tex.), 19 S. W. Rep. 291, distinguished.

² Lawrence County v. Hudson, 41 Ark. 494.

⁵ Libby v. County of Anoka, 38

³ Beatty v. Sibley County, 32 Minn. 470. Minn. 448; s. c., 38 N. W. Rep. 205.

⁶ State v. Allen, 23 Neb. 451; s. c.,

⁴ McKinney v. Robinson (Tex.), 19 36 N. W. Rep. 756.

sioners' court, for receiving and disbursing moneys belonging to the county (excepting school funds), a failure by the commissioners' court to make an order regulating the allowance in a particular case raises an implied agreement on the part of the county that the treasurer shall have the maximum percentage allowed.¹ And where the commissioners' court is authorized to fix the allowance of the county treasurer, within certain prescribed limits, and such court has for a long time allowed the same percentage, a failure to make an order regulating the allowance in a particular case raises an agreement by implication on the part of the county to continue to pay the same amount until it should notify the treasurer to the contrary.² So where funds which the law requires to pass through the hands of the county treasurer, and for the receiving and disbursing of which he is entitled to a commission, are received and disbursed by another officer, the treasurer is entitled to recover from the county the commissions to which he would have been entitled had he handled the funds according to law.³ The commissioners and auditors of a county in Pennsylvania, in determining the compensation of a county treasurer, may, in their discretion, fix one rate on ordinary receipts and disbursements, and a less rate on money received and paid out on account of the erection of county buildings.⁴ They may also fix it for that year instead of fixing it only once during the treasurer's term.⁵ Such a decision of commissioners and auditors is not reviewable by the courts.⁶ In Illinois, county treasurers are not entitled to any commission out of money paid in and out under the "Eminent Domain Act," providing that "the payment of the compensation adjudged may in all cases be made to the county treasurer, who shall on demand pay the same to the party entitled thereto."⁷

§ 831. **Settlements with treasurers.**—The California county government act provides that the treasurer shall re-

¹ Bastrop County v. Hearn, 70 Tex. 563; s. c., 8 S. W. Rep. 302.

² Bastrop County v. Hearn, 70 Tex. 563.

³ Bastrop County v. Hearn, 70 Tex. 563.

⁴ Merwine v. Monroe County (Pa.), 21 Atl. Rep. 509.

⁵ Merwine v. Monroe County, 141 Pa. St. 162; s. c., 21 Atl. Rep. 509.

⁶ Merwine v. Monroe County, 141 Pa. St. 162; s. c., 21 Atl. Rep. 509.

⁷ Farley v. Chicago & C. R. Co., 36 Ill. App. 517.

ceive no money unless accompanied by the certificate of the auditor, as provided in that act, or otherwise as provided by law. The act provides that the auditor must settle the accounts of all persons holding money payable into the county treasury and certify the amount to the treasurer, and, on the filing of the treasurer's receipt therefor, give him a receipt, and charge the treasurer with the amount. The code provides that the auditor must settle with the tax collector and require from him the treasurer's receipt, or, if the treasurer is collector, require from him an immediate account for any existing deficiency. It has been held that it was sufficient, where the same person was treasurer and collector, to charge him and his sureties as treasurer, that the auditor settled with him as collector and handed him the certificate of the amount found due, which receipt was found in the county treasury, and at once credited him as collector and charged him as treasurer with such sum.¹ Under the Missouri statute requiring that the county treasurer shall settle his accounts with the county court semi-annually, and, if he die, his executor or administrator shall immediately make such settlement, the estate of a deceased treasurer is not in default until notice to make such settlement is served on the executrix; and until such notice the county court has no authority to make the settlement.² When a county treasurer receives money from the tax collector as county taxes, he and his sureties are estopped to deny that the money belonged to the county without regard to the form of his receipt to the collector.³ A receipt given by a county treasurer to a tax collector in the form of an "I. O. U." is admissible against the sureties of the treasurer, and may be explained by parol evidence showing that it was given for county taxes received from the collector to be accounted for on settlement at the end of the month.⁴ The probate judge being authorized by a county treasurer to discharge official duties for him as agent, and as such making two settlements with the tax collector (one before and the other after the death of the treasurer), his acts and entries in connection with the first settlement, but not the second, are binding on the

¹ Butte County v. Morgan, 76 Cal. 1; s. c., 18 Pac. Rep. 115.

² Cole County v. Schmidt (Mo.), 10 S. W. Rep. 888.

³ Coleman v. Pike County, 83 Ala. 326; s. c., 3 So. Rep. 755.

⁴ Coleman v. Pike County, 83 Ala. 326.

sureties of the treasurer and admissible as evidence against them.¹ It has been held in Texas that where a tax collector who was also a cashier of a bank drew checks on such bank for the purpose of paying to the treasurer sums of money which he had collected, and the treasurer accepted such checks, indorsed them, and turned them over again to him to be placed to his credit on the books of the bank, such transaction constituted a payment to the treasurer of the sums collected by him as tax collector, he having funds on deposit in the bank to pay such checks, although as cashier he may have failed to give the treasurer credit for such checks.² Under the Nebraska statute giving the county commissioners power to appoint an examiner of the treasurer's accounts, "when the same shall appear to be necessary" in their "opinion," they are the sole judges as to when the necessity exists.³

§ 832. Action to recover county funds.— Where a person, by conspiring with the treasurer of a county, comes into the possession of a county's money, an action may be maintained against him therefor. The county is not confined to its remedy on the treasurer's bond.⁴ And in such an action, the evidence tending to show that the transactions between the two, involving this money, began when the treasurer entered upon the duties of his office and were continued until his last settlement with the supervisors, evidence of statements made officially by the treasurer, as a part of his semi-annual settlements, may be admitted as tending to show the amount of money for which the treasurer was liable at different times, and, when considered with other evidence, the dealings between the two under the alleged conspiracy.⁵ In case of a failure of a sheriff to pay county creditors, as he was authorized by act to do, out of the county levy of taxes, as the act provided also that the sheriff should settle with the county treasurer and that the latter should bring suit against the

¹ *Coleman v. Pike County*, 83 Ala. 326.

² *Kempner v. Galveston County*, 73 Tex. 216; s. c., 11 S. W. Rep. 188.

³ *Kearney County v. Tuttle*, 16 Neb.

⁴ *Taylor County v. Standley* (1890), 79 Iowa, 666.

⁵ *Taylor County v. Standley* (1890), 79 Iowa, 666.

former if delinquent, the county treasurer may sue for the money due the creditors.¹ It has been held in a summary proceeding by distress for a balance found due by a county tax collector during the two years he had held office that the statute should have been strictly pursued, and that by reason of neglect to require monthly settlements of this officer and the delay in issuing the warrant, the State auditor was without authority to proceed in that manner and further proceedings should be enjoined.² Money raised by tax to pay town bonds is properly payable to the supervisor. Where he has received such money and paid it to the county treasurer, who failed to account for the same, such payment has been held no defense to an action on the supervisor's bond, since no law authorized its payment to the treasurer.³ And after money has been collected and received by the supervisor on town funds, he and his sureties, in an action on his bond, are estopped from questioning the regularity of the tax under which it was collected.⁴ And though the conditions of the supervisor's bond did not conform literally to the language of the statute, since the substance was within the requirements, it was sufficient.⁵

§ 833. Actions on treasurer's bond.—The county is the proper party to bring action on the county treasurer's bond running to the county and State, though the treasurer had collected and failed to pay over State taxes, where the county is charged with the levy and collection of all county and State taxes, and where the State taxes are charged to the county until paid into the State treasury.⁶ Where a county treasurer has resigned and failed to account for and pay to his successor the money with which he was charged, a demand before suit on the bond has been held not to be necessary in Dakota.⁷

¹ *Berry v. Commonwealth* (Ky., 1890), 14 S. W. Rep. 589.

² *Judson v. Smith* (1890), 104 Mo. 61; s. c., 15 S. W. Rep. 956.

³ *Purcell v. Town of Bear Creek* (Ill.), 28 N. E. Rep. 1085.

⁴ *Purcell v. Town of Bear Creek* (Ill.), 28 N. E. Rep. 1085.

⁵ *Purcell v. Town of Bear Creek* (Ill.), 28 N. E. Rep. 1085.

⁶ *Valley County v. Robinson* (Neb.), 49 N. W. Rep. 356.

⁷ *Clay County v. Simonsen*, 1 Dak. 403; s. c., 46 N. W. Rep. 592, for the reason that the statute provides that on going out of office the treasurer shall deliver to his successor all moneys, books, accounts, papers and documents in his possession.

Nor need the complaint on his bond show that the commissioners have adjusted his accounts under the statute which provides that, "if any person thus chargeable shall neglect or refuse to render true accounts or settle as aforesaid," the commissioners shall adjust the accounts and ascertain the balance due the county and order suit to be brought.¹ It has been held that the Indiana statute which provides that upon failure of a county treasurer to pay over the revenues collected for county, road and other purposes, as required by law, suit shall be instituted therefor by the prosecuting attorney against the treasurer and his bondsmen, applied to the failure of a treasurer, whose term of office had expired, to pay over the funds in his hands to his successor.² In an action on a county treasurer's bond for his failure to pay over money to his successor, a plea alleging that the default was covered by a bond given during a former term of such treasurer was held demurrable as failing to deny that the money came into his hands as his own successor for the term for which the bond in suit was executed.³ Nor was an allegation in the plea that the default was covered by fees illegally allowed the treasurer by the board of supervisors, and that the statute of limitations had run against their recovery, any defense, as the allowance of such fees was void and the money remained in the treasurer's hands as funds of the county.⁴ A treasurer must account for the money actually received, notwithstanding the charges made against him are of fictitious items instead of the true one, as, in the case cited in the note, money received of his predecessor on account of a certain gravel-road fund.⁵

§ 834. Public depositories.—It has been held that moneys paid as fines and forfeitures to the city treasurer, under the Kansas statutes as to cities, etc., are city funds, and for the purpose of designating a bank or a depository for them they are under the control of the mayor and council; though, when they are

¹ *Clay County v. Simonsen*, 1 Dak. 403; s. c., 46 N. W. Rep. 592.

³ *McKinney v. Monroe County*, 68 Miss. 284; s. c., 8 So. Rep. 648.

² *Board of Comm'rs v. Wood*, 126 Ind. 168; s. c., 25 N. E. Rep. 190; *Wood v. Board of Comm'rs*, 125 Ind. 270; s. c., 25 N. E. Rep. 188; Dist. Board *v. Templer*, 34 Ind. 322.

⁴ *McKinney v. Monroe County*, 68 Miss. 284; s. c., 8 So. Rep. 648.

⁵ *Beaver v. State* (1890), 124 Ind. 324.

deposited in the bank designated, they are still subject to the order of the board of police commissioners to the same extent as they were when they were held by the city treasurer.¹ And a national bank may be a depository for such funds, and may lawfully agree to pay interest on the deposits and to give a bond for their security.² Where a bank had been named as a county depository, the vice-president of the bank was held authorized to turn over to the county treasurer notes belonging to the bank as collateral security for the deposit secured by the bond given by the bank; that the treasurer was authorized to receive and hold such collateral in addition to the bond; and that the sureties on the bond had a right to demand that these collaterals should be exhausted before their property should be taken on execution therefor.³ Under the special Michigan local statute which provides that the treasurer of Wayne county and the board of auditors shall designate some bank as a depository for the county funds, it has been held that the board and the incumbent treasurer cannot appoint a bank to be the depository beyond the expiration of the incumbent's term of office.⁴ But the newly-elected treasurer and the board should designate a depository as soon as convenient.⁵ The treasurer and board have an equal voice in making the designation.⁶ But the designation by a retiring treasurer is valid till the end of his term and till a new depository is designated by the board and incoming treasurer.⁷ And until a new designation it is the duty of an incoming treasurer to deposit the funds in the previously designated

¹ *Interstate Nat. Bank v. Ferguson*, (Kan., 1892), 30 Pac. Rep. 237. The court said:—"If it should become necessary at any time for the board to use any of these funds for the purpose of paying the salaries of officers or of the expenses of the police department, the board might draw its order upon the city treasurer for the amount, and when such order should be presented to the city treasurer he would draw his check on the bank designated . . . in favor of the person, . . . which check or

draft . . . would be promptly paid."

² *Interstate Nat. Bank v. Ferguson* (Kan., 1892), 30 Pac. Rep. 237.

³ *Richards v. Osceola Bank* (1890), 79 Iowa, 707.

⁴ *City Sav. Bank v. Wayne County Treasurer*, 84 Mich. 391; s. c., 47 N. W. Rep. 690.

⁵ *City Sav. Bank v. Wayne County Treasurer*, 84 Mich. 391.

⁶ *City Sav. Bank v. Wayne County Treasurer*, 84 Mich. 391.

⁷ *City Sav. Bank v. Wayne County Treasurer*, 84 Mich. 391.

depositories.¹ Under the Kansas statute authorizing the board of county commissioners to designate a bank in which the county treasurer shall deposit the county funds, the board has no authority to designate a depository for a definite period. Nor can it make a depository that will prevent the designation of a different depository whenever the board should deem it for the public interest.²

§ 835. Examination of county officers' accounts.—Where the files and papers relating to proceedings in a police court have been turned over by the clerk to a city comptroller, and are being used by the city council to investigate the accounts of the clerk and judge, the judge has no authority to order the comptroller to return the files and papers.³ A board of county commissioners, under the "exclusive jurisdiction" granted them by the statute of Georgia providing for such a board, "in examining and auditing the accounts of all officers having the care, management, collecting or disbursing of the money of the county, and in bringing said officers to a speedy settlement, have the power to audit and examine the accounts of a tax collector, and if the examination shows him indebted to the county and the amount not paid over to the county treasurer, to bring him to a speedy settlement by issuing an execution against him."⁴ The Georgia legislature has the power to pass separate and distinct acts for any counties which require county commissioners; and it is not necessary that these acts shall be uniform in all such counties.⁵

§ 836. Liability of custodians of funds.—Sureties of a surrogate are not liable for a partial loss of the proceeds of the sale of a decedent's real estate deposited by the surrogate

¹City Sav. Bank v. Wayne County Treasurer, 84 Mich. 391.

²First Nat. Bank v. Peck, 43 Kan. 643; s. c., 23 Pac. Rep. 1077.

³Schwartz v. Barry (Mich., 1892), 51 N. W. Rep. 279. The court said:—"These files and papers were in the first place lawfully in the hands of the comptroller as the chief financial officer of the city, and without objection of any one. The common

council had a right to investigate this matter of fees which belonged to the city treasury, and to have access to these papers, and it was not in the power of the police judge to take them into his possession while this investigation was going on."

⁴County of Pulaski v. Vaughn (1889), 83 Ga. 270.

⁵County of Pulaski v. Vaughn (1889), 83 Ga. 270.

in a bank, then of good standing, which afterwards failed.¹ Where a county treasurer, who by law was forbidden to buy or sell or in any manner deal in county warrants, on payment of a county warrant neglects to cancel it, but marks it "Not paid, for want of funds," and puts it into circulation, a subsequent holder, though he purchased for value and in good faith, cannot maintain an action against the sureties on the treasurer's official bond for alleged malfeasance in office.² Under the Nebraska statute requiring the county clerk, *ex officio* register of deeds, to keep an index of the deeds, such index becomes a public record, the fees for a certified copy of which he is required to account for to the county board.³ If a county clerk receives money in his official capacity and unlawfully converts it, he is liable on his official bond without regard to whether he had the right to distribute the money or not.⁴ Though the clerk of a board of supervisors gives his deputy entire charge of his office, he is not liable to the purchaser of county warrants fraudulently issued by the deputy, who used for that purpose the blanks furnished by the county, signing thereto the names of the clerk and the president of the board, and attaching the clerk's official seal.⁵ Where paper purporting to be the obligation of a township has been issued without consideration, the holder, whether the payee or an assignee, has no right of action on the bond of the trustee, under the Indiana statute providing for such liability only in cases where the trustee contracts a *debt* in the name or in behalf of the township, contrary to certain provisions of the statute.⁶

§ 837. Liabilities on bonds of custodians of school funds.

Where, in an action on the bond of a school trustee for a shortage in the funds, it appears that he paid moneys out of the special school fund on account of the common school fund, he should be given credit for the amount thus paid, and not

¹ *People v. Faulkner*, 107 N. Y. 477; s. c., 14 N. E. Rep., 415.

² *McConnell v. Simpson*, 36 Fed. Rep. 750.

³ *State v. Sovereign*, 17 Neb. 173.

⁴ *Henry v. State*, 98 Ind. 381.

⁵ *Whyte v. Mills*, 64 Miss. 158; s. c., 8 So. Rep. 171.

⁶ *State v. Hawes*, 112 Ind. 323; s. c., 14 N. E. Rep. 87. Followed in *State v. Brown*, 112 Ind. 600; s. c., 14 N. E. Rep. 487, and *Grimsley v. State*, 119 Ind. 130; s. c., 17 N. E. Rep. 928.

be charged with the entire shortage in the special fund.¹ And this credit should not be denied him because his answer alleges that the overpayments were made for the benefit of the special school fund, while the proof shows that they were made for the benefit of the common school fund.² Under the Minnesota statute which requires the treasurer of a school district to give a bond with sureties, conditioned for the faithful performance of the duties of his office and to turn over to his successor in office all money in his hands belonging to the district, and further provides that for any breach of such bond the board shall cause an action to be commenced thereon, a vote of the school district and of the board of education, without consideration, to discharge the legal obligations of a treasurer who has lost the school funds by burglary without fraud, has been held to be ineffectual.³ The fact that such treasurer has lost the funds by burglary, although without his own fault, constitutes no defense to an action on his official bond for the failure to pay over to his successor the money received and not disbursed by him.⁴ The treasurer of a board of education deposited school moneys in the name of and along with the funds of a private corporation of which he was the manager, with the knowledge of a bank's officials, which deposit was subject to his check for both school and private purposes. His drafts as manager of the private corporation were so large as to leave a deficit in the amount due by him to the board of education. This board shortly afterwards required of him a new bond. It was held that as funds of the private corporation sufficient in amount to make up this deficit were soon afterwards deposited by him, this was a payment of that deficit. Therefore, the sureties on the second bond were held liable for a deficit existing at the expiration of his term as treasurer.⁵ The board of education, being the general representative of the school organization as a corporation, and not the successor in office of the treasurer of the board, is the proper party to commence an action on the bond

¹ *Finney v. State*, 126 Ind. 577; s. c., 26 N. E. Rep. 150.

⁴ *Board of Education v. Jewell*, 44 Minn. 427.

² *Finney v. State*, 126 Ind. 577.

⁵ *Gilbert v. Board of Education*, 45

³ *Board of Education v. Jewell*, 44 Minn. 427; s. c., 46 N. W. Rep. 914.

Kan. 31; s. c., 25 Pac. Rep. 226.

of the treasurer for failure to pay over to his successor the balance due the board.¹ The final report made by a school-township treasurer and the entries in his books made by him in such capacity are conclusive evidence against him and his sureties as to the amount due in an action on his bond.²

§ 838. **Investment of school funds.**—It has been held in Nebraska, under the provisions of the constitution and statutes, that the board of educational land and funds has authority to invest the permanent school fund in United States three per cent. bonds and to pay premiums therefor, if necessary, and that such premiums should be paid out of the permanent school fund.³ But it cannot, after investing them in those bonds, sell or convert them into high rate of interest registered county bonds; but when paid they may be re-invested in such bonds.⁴ Nor can they, in purchasing high rate of interest coupon bonds, detach coupons therefrom so that the remaining coupons will net the State six per cent. from the date of purchase to maturity.⁵ And payment of premiums in the purchase of county bonds must be made from the temporary school fund.⁶

§ 839. **Loan of school funds.**—By one provision of an Indiana statute the several counties are made liable for so much of the public school funds as is intrusted to them and the annual payment of interest thereon. By another it is made the duty of the county auditor, when premises mortgaged to secure a loan of such funds fail to sell for a sum sufficient to satisfy the principal and interest, to bring suit on the notes in the name of the State. It has been held that the county might pay the deficiency before the auditor brought suit.⁷ Under the Missouri statute authorizing the county court to invest and manage school funds and loan them on specified security, such court cannot discharge a surety from his liability on a

¹ *Gilbert v. Board of Education*, 45 Kan. 31.

² *Longan v. Taylor*, 31 Ill. App. 263; affirmed in 130 Ill. 412; s. c., 22 N. E. Rep. 745.

³ *In re School Fund*, 15 Neb. 684; s. c., 50 N. W. Rep. 272.

⁴ *In re School Fund*, 15 Neb. 684.

⁵ *In re School Fund*, 15 Neb. 684.

⁶ *In re School Fund*, 15 Neb. 684.

⁷ *Lopp v. Woodward (Ind.)*, 27 N. E. Rep. 575.

bond given for the loan of school money, upon his delivering "in payment" his note with personal security, as that is in effect a re-loan, and the statute requires that all loans of school funds shall be secured by mortgage.¹ Nor can a county court delegate its power under those statutes to make loans or to compromise those already made, without requiring the final approval by the court of the security.² And a person who signs as surety after delivery, a bond under seal given to secure a loan of school moneys cannot escape liability by showing that no order requiring additional security was entered of record, without also showing that there was no other consideration, as the seal imports a consideration.³ Where the statute requires two or more sureties upon a loan of school funds, and there are several signers to a note for such loan, it will be presumed that such note was executed in conformity with the law, and that at least two of such signers are sureties.⁴

§ 840. Liability of officers and agents of towns.—If a township trustee, relying entirely upon the judgment of the board of directors, and against his own judgment, loans money belonging to the school fund on insufficient security, whereby a loss occurs, his official bond is liable therefor.⁵ In an action on such a bond for a loss caused by the trustees loaning moneys of the school fund on insufficient security, it was held to be error to permit witnesses to testify that they never heard any dissatisfaction expressed in regard to the loan by any person.⁶ In the absence of fraud, or consequent damage or loss, the fact that school directors knowingly drew a warrant on a fund to the credit of which there was no money wherewith to meet such warrant at the date thereof, such draft for any school year on any fund, having been limited to the amount to be derived from all sources during that year, has been held not to be such an illegal exercise of authority as will render directors personally liable for the

¹ *Montgomery County v. Auchley*, 103 Mo. 492; s. c., 15 S. W. Rep. 626.

² *Montgomery County v. Auchley*, 103 Mo. 492.

³ *Montgomery County v. Auchley*, 103 Mo. 492.

⁴ *Trustees of Schools v. Southard*, 31 Ill. App. 359.

⁵ *Board of Trustees v. Baker*, 84 Ill. App. 620.

⁶ *Board of Trustees v. Baker*, 84 Ill. App. 620.

amount of the warrant.¹ Where a contract for building a school-house contained the names of the school directors, and their description as such as contracting parties, and was signed by them as directors, but did not expressly show that they were acting on behalf of the district, or intended to make the instrument the contract of the district, it has been held that the directors were individually liable.² The trustees of a township are not personally liable for the non-payment of a town order executed by them as such trustees and given in payment for a machine purchased by them for the use of the township.³ An allegation that such an order was invalid in so far as it purported to bind the township, and that the trustees had no authority to make the purchase for which the order was given, will not render the trustees personally liable in an action on the order.⁴ Agents of a town who sold bonds issued under a special act to furnish seed wheat to sufferers from the ravages of grasshoppers, and collected the notes of the farmers and paid the sums collected to the purchasers of the bonds, except a sum which they retained for the expenses of litigation, the nature of which was not disclosed, were held liable personally for the amount thus retained.⁵ A county in its corporate capacity may sue the county treasurer on his bond for failure to pay over the school fund for which the county commissioners are authorized to levy a tax.⁶

(b) APPROPRIATIONS.

§ 841. Appropriations out of special funds.— Street improvement bonds issued by agreement with a contractor to be paid “out of a special” fund, by warrants showing on their face that they are so payable, create a liability payable out of

¹ *Jacquemin v. Andrews*, 40 Mo. App. 507.

² *Sharp v. Smith*, 32 Ill. App. 336.

³ *Willett v. Young* (Iowa, 1891), 47 N. W. Rep. 990.

⁴ *Willett v. Young* (Iowa, 1891), 47 N. W. Rep. 990.

⁵ *Powell v. Heisler*, 45 Minn. 549; s. c., 48 N. W. Rep. 411. But it was held, also, that if such bonds were issued under a void statute, these

agents, having followed the statute in their disposition of the proceeds of the bonds, would not be held liable for the price paid by one who purchased with notice of the act under which the bonds were issued, and the purpose for which the money would be used.

⁶ *Aiken County v. Murray* (S. C.), 14 S. E. Rep. 954, following *Greenville County v. Runion*, 9 S. C. 1.

a particular fund, and not out of the treasury generally.¹ It being shown in an action to collect the amounts due on certain county warrants that the special fund provided for the payment of these warrants had been illegally withdrawn and appropriated to other purposes by the county authorities, a proceeding by *mandamus* would be useless, and an action in *assumpsit* has been held maintainable.² The fact that there is not quite enough money in a county treasury to pay the price of land legally purchased for a court-house is not ground for restraining such payment, where the deeds for the land have been accepted and filed for record; it appearing that, when the warrants were drawn, the county treasurer had stated to the county court that there was enough money to pay the appropriation, and the county court having the right to anticipate the revenue of the county to the extent of the revenue provided for that year.³ Where a county court has ordered an appropriation for the construction of certain highway bridges, it may, before any contract or individual rights have become involved, rescind the order, if in the exercise of its discretion it deems the appropriation unwise.⁴ It has been held in Connecticut that after appropriating a certain amount for the erection of a school-house, a vote, during the building, that a tax of two mills be laid and applied to building account, does not indicate that the town ratified expenditures beyond the amount first appropriated.⁵ A city has no power to appropriate public money for the erection of a building to be used in part by a certain Grand Army post during its existence as an organization, since that is not a public use.⁶

§ 842. Appropriations anticipating revenue.—A debt payable in the future, or payable upon a contingency or the happening of some event, such as the rendering of services or the delivery of property, as well as a debt payable presently and absolutely, is within the constitutional inhibition, it making no difference whether the debt be for current expenses or

¹ *Baker v. City of Seattle* (Wash.), 27 Pac. Rep. 462.

² *Hockady v. County Comm'rs* (Colo.), 29 Pac. Rep. 287.

³ *Sheidley v. Lynch*, 95 Mo. 487; s. c., 8 S. W. Rep. 434.

⁴ *Crittenden County v. Shanks* (Ky.), 11 S. W. Rep. 468.

⁵ *Turney v. Town of Bridgeport*, 55 Conn. 412; s. c., 12 Atl. Rep. 520.

⁶ *Kingman v. City of Brockton*, 153 Mass. 255; s. c., 26 N. E. Rep. 998.

for something else. But appropriations may be made or warrants drawn upon the treasury in anticipation of taxes to be thereafter collected; provided the tax, at the time of appropriation, be actually levied, and the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, be such that it shall operate to prevent any liability to accrue on the contract against the corporation. Where a fund is provided to meet the same, the appropriation or warrant creates no liability, but one thing is simply exchanged for another.¹ The rule is thus stated in another case:— A municipal corporation which has reached the constitutional limit of its power to create indebtedness may, when a tax is levied but not yet collected, draw against the fund thus levied and thus appropriate and virtually assign the amount specified in the warrant, and when collected the holder will have the right to receive it. But the corporation must be discharged, and the holder must look exclusively to the tax thus levied, and to the officers, for his pay.² But the procuring of “temporary loans” by the corporation, which would be payable at all events, would be the creation of corporate indebtedness, and, therefore, if in excess of the constitutional fund, not a permissible mode of anticipating such taxes.³

§ 843. Specific funds.— Under the Texas statute which provides that cities shall have power “to provide by ordinance special funds for special purposes, and make the same disbursable only for the purpose for which the fund was created, and any officer of the city misappropriating such special

¹ This rule is laid down in *Springfield v. Edwards* (1877), 84 Ill. 626. See, also, as to the rule that when liabilities are created and appropriations are made which are within the limits of the revenue accruing to meet them, they are not debts within the meaning of the constitution: *Grant v. Davenport*, 36 Iowa, 396; *People v. Pacheco*, 7 Colo. 175; *Kopikus v. Capitol Comm'rs*, 16 Cal. 253; *State v. McAuley*, 15 Cal. 455; *State v. Medberry*, 7 Ohio St. 522;

State v. Mayor, 23 La. Ann. 358. These cases maintain the doctrine that revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury; that the appropriation of moneys when received meets the services as they are rendered — thus discharging the liabilities as they arise, or rather anticipating and preventing their existence.

² *Law v. People* (1877), 87 Ill. 385.

³ *Law v. People* (1877), 87 Ill. 385.

fund shall be deemed guilty of malfeasance in office," the city has no power to loan money realized from the sale of water-works bonds; and the bondsmen of a city treasurer are entitled to an injunction restraining him from carrying out an agreement to loan such fund.¹ Nor does another statute making it the "duty of the comptroller to see that a tax is levied and collected, . . . and to create a sinking fund," authorize the loaning of money realized from the sale of water-works bonds as a sinking fund.² Coal used in running draining-machines, and lumber in making repairs not capable of being identified as separate improvements, have been held not to be "permanent improvements" within the meaning of the Louisiana statute which required the city of New Orleans to set aside in each year twenty per cent. of her revenues of that year to pay for "permanent improvements."³ Nor do those acts repeal the statute which provides that the city of New Orleans shall devote the revenues of each year to the expenses of that year; and debts for permanent improvements of one year cannot legally be left unpaid and the "revenue fund" for that year applied towards paying for improvements made in a previous year.⁴

§ 844. The same subject continued — Construction of statutes.— Where a council appropriates for a sewer a certain sum over and above the amount appropriated for that purpose by the appropriation bill of the preceding year, and the same is made on special assessment against certain property, but afterwards a new assessment is ordered and the excess is taken off of the said property and appropriated from the general fund, the property owners cannot be heard to complain that the appropriation was not submitted to the electors of the city.⁵ The Arkansas statute which provides that "no

¹ City of Bonham v. Taylor (Tex.), 16 S. W. Rep. 555.

² City of Bonham v. Taylor (Tex.), 16 S. W. Rep. 555.

³ Barber Asphalt Pavement Co. v. City of New Orleans, 41 La. Ann. 1015; s. c., 9 So. Rep. 484.

⁴ Barber Asphalt Paving Co. v. City of New Orleans, 41 La. Ann. 1015. The twenty per cent. revenue

for permanent improvements is made part of the budget by the statutes, and can be drawn against by special ordinances for permanent improvements during the year, although not made part, in express terms, of the annual budget of expenses.

⁵ Townsend v. City of Manistee (Mich.), 50 N. W. Rep. 321.

county court or agent of any county . . . shall make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended," applies to contracts for building bridges; and the fact that an appropriation was made to pay for preliminary work in securing a bridge does not authorize the board of commissioners to let a contract for the building of a bridge before an appropriation has been made to pay for the same in whole or in part.¹ A creditor having a judgment against a city authorized by the constitution of its State to levy sufficient taxes to pay all legal debts is entitled to a *mandamus* to compel a sufficient levy to pay such judgment; and the fact that there are certain uncollected taxes levied for creditors generally does not limit the right of such creditor to a *pro rata* payment from such funds.² Under the statute of New York directing certain funds raised by taxes on the property in a city to be paid to the railroad commissioners, and by them applied to the interest on certain bonds, an indorsement to a bank by the railroad commissioners of an order for such fund drawn on the city treasurer by the city members of the board of county commissioners gives the bank no title to the fund, to authorize *mandamus* to the city treasurer to pay over the amount of the order.³ Where an ordinance provides for the purchase of water-pipe, but not for payment, and afterwards a fund is raised to build reservoirs and purchase and lay water-pipes, the cost of the pipe is properly payable out of such fund.⁴ Under the provision in the constitution of Arkansas that no county, city or town, or other municipal corporation, shall appropriate money or loan its credit to any corporation, institution or individual, the common council of a town has no power to appropriate money to aid the building of a court-house in such town.⁵

§ 845. Statutory provisions further considered.— The code of Iowa provides that on final settlement with the su-

¹ Fones Bros.' Hardware Co. v. Erb (Ark.), 17 S. W. Rep. 7.

⁴ Dhrew v. City of Altoona (Pa.), 15 Atl. Rep. 636.

² Voorhies v. City of Houston, 70 Tex. 331; s. c., 7 S. W. Rep. 679.

⁵ Russell v. Tate, 52 Ark. 541; s. c., 13 S. W. Rep. 130.

³ People v. Stupp, 2 N. Y. Supl. 537.

pervisors of road districts the township trustees, if there shall be no money in the treasury, shall order the clerk to issue orders for the amount due with the number of the district to which they belong, which shall be received as money in payment of highway tax in such district. It also authorizes the trustees to levy a tax for township road funds, and requires them to set apart for the use of the whole town a sum sufficient to purchase tools, machinery and guide-posts. The supervisor of each district is the collector of its road tax, and is not required to pay any part of it to the clerk, except that portion required for tools, etc. The balance must be expended exclusively in the district in which it is levied. It has been held that road orders given supervisors on general settlements for labor done in their respective districts, and not including outlay for tools, etc., cannot be paid out of the general fund, but each must be confined to the particular district.¹ Under the South Carolina statute which provides that county commissioners shall not draw any checks for the payment of any claims until notified by the county treasurer that there are sufficient sums in the county treasury applicable to the payment thereof, the county commissioners have no authority to draw any check to pay the claim of a sheriff for dieting prisoners in jail until they receive such notice, even though there might be funds at the time applicable to some other object of county expenditure.² A Nebraska statute provides that the city council of a city shall every year pass an ordinance—the “Annual Appropriation Bill”—in which such corporate authorities may appropriate such sums of money as may be deemed necessary to defray all necessary expenses and liabilities, not exceeding in the aggregate the amount of tax to be levied during that year; and that no further appropriation shall be made during the fiscal year, unless the proposition therefor has been sanctioned by a majority of the legal voters. It has been held that where a proposition to borrow money for a specific purpose has been sanctioned by a majority of the legal voters, the money borrowed and placed in the treasury is appropriated to the purpose intended, and is subject to the disposal of the mayor and

¹Bradley v. Love, 76 Iowa, 397; ²Hunter v. Mobley, 26 S. C. 192;
S. C., 41 N. W. Rep. 52. S. C., 1 S. E. Rep. 670.

council without the ordinance mentioned in the act.¹ Under the provision of the California constitution that no county shall incur any liability or indebtedness in any manner or for any purpose, exceeding in any year its annual revenues, except by authority of a two-thirds vote of the electors, it has been held that each year's income and revenue is intended to pay each year's indebtedness and liability, and no indebtedness or liability incurred in any one year should be paid out of the income or revenue of any future year.²

§ 846. Appropriations for schools.— A Kentucky statute appropriated the fines and forfeitures recovered in the name of the commonwealth to the board of trustees of the town of Harrodsburg, to be expended on public improvements, and also legalized any previous appropriation of such funds by the trustees consistent with the statute, and not inconsistent with another statute which appropriated such funds to the common schools. It has been held that the statute did not legalize any previous appropriation of such money to any other purposes than common schools.³ Under the provision of the constitution of Nebraska that "all fines, penalties and license moneys arising under the general laws of the State shall belong and be paid over to the counties, respectively, where the same may be levied or imposed," and shall be appropriated to the support of the schools of the respective subdivisions where the same may accrue, money received for liquor license, issued by a county board belongs exclusively to the support of the common schools of the county in which the license was issued, and not to the school district in which the liquors are sold.⁴ The Florida statute providing that the county treasurers forward to the State treasurer all funds collected by them on account of the one-mill tax for the com-

¹ State v. Martin (Neb.), 43 N. W. Rep. 244.

² Shaw v. Statler, 74 Cal. 258. See, also, San Francisco Gas Co. v. Brickwedel, 62 Cal. 641; Schwartz v. Wilson, 75 Cal. 502.

³ Board of Trustees v. Harrodsburg Educational Dist. (Ky.), 7 S. W. Rep. 312.

⁴ State v. Fenton (Neb.), 45 N. W. Rep. 464. Where portions of three school districts are within the limits of an incorporated village, the moneys received by the village authorities for liquor licenses will be equally divided between such districts. State v. White (Neb.), 45 N. W. Rep. 631.

mon schools, and that the superintendent of public instruction shall apportion the moneys that may be in the hands of the State treasurer in the same manner as the common-school fund is apportioned, has been held to be in contravention of that section of the constitution which provides that provision shall be made by law for the distribution of the common-school fund among the different counties in proportion to the number of children residing therein between the ages of four and twenty-one years; this section including the one-mill tax and furnishing the method of its apportionment.¹ A Nebraska village was partly in three school districts, the school-house in each of said districts being outside of its corporate limits. The sum of \$1,000 was received by the corporate authorities of that village for liquor licenses therein. It was held that under the provision of the constitution that license fees shall be used for the support of schools in the subdivision where they accrue, as the formation of the school districts was a power bestowed on the county-superintendent, the presumption was that the districts were so formed for the convenience of the pupils, or to include taxable property, or both causes combined, and were entitled to an equal division of the money.² The statute of Indiana providing that before a trustee of a township shall incur, on behalf of his township, debts exceeding the fund on hand, and to be derived from "the tax assessed against his township for the year in which such debt is to be incurred," he shall procure an order from the county commissioners authorizing such indebtedness, which shall not be granted until he shall file in the auditor's office a petition setting forth the purposes for which the indebtedness is to be made, of which he shall have given notice, has been held to apply to expenses for the furniture of a school-house.³

§ 847. The same subject continued.—The charter of Long Island City provides that a sum equal to the estimate of the board of education, not exceeding three-fourths of one per cent. on the valuation of taxable property, shall be apportioned

¹ State v. Barnes, 22 Fla. 8.

² Jefferson School Tp. v. Litton

³ State v. Brodboll (Neb.), 44 N. W. (1889), 116 Ind. 467; s. c., 19 N. E. Rep. 186.

Rep. 323.

for school purposes, and paid by the city treasurer on drafts drawn by the board. The common council appropriated \$50,000 for work in certain school-houses, and the board drew warrants against such appropriation. It was held to be the duty of the city treasurer to pay such warrants out of moneys of the board in his hands until the aggregate of the drafts on the fund should reach the amount of the limitation.¹ Where it is provided by statute that warrants issued under it "shall show upon their face that they are payable solely from said taxes when collected and not otherwise," there is a sufficient compliance with the statute when the warrants read that they are "payable only from the appropriation of the taxes . . . appropriated and levied for the street-light fund when collected."² A Nevada act authorizing a transfer of surplus money remaining in the railroad interest and sinking fund of a county to the school fund has been held to authorize the transfer of moneys to the school fund that were due the railroad interest and sinking fund at the time of its passage, though they were not then actually in the hands of the treasurer.³ Nor was that act repealed by the statute of Nevada of 1881, page 32, authorizing the county commissioners to transfer surplus moneys from one fund to another, and to "transfer the same back to the fund or funds from which such surplus money was taken."⁴

§ 848. Budget.—The Illinois statute requiring cities to pass appropriation ordinances within the first quarter of each fiscal year does not apply to a city organized under a special charter requiring no such ordinance.⁵ An Illinois statute provides that city councils shall pass an annual appropriation bill within the first quarter of each fiscal year. Such a bill was passed by the city council on the last day of the quarter. Afterwards one of the items was vetoed by the mayor and passed

¹ *Pierce Mfg. Co. v. Bleckman*, 16 N. Y. Supl. 768. See, also, *People v. Kelly*, 76 N. Y. 475.

² *City of East St. Louis v. Flannigan* (1890), 36 Ill. App. 50, holding warrants drawn for gas furnished after a tax levy against a fund appropriated for that purpose valid.

³ *State v. Comm'rs*, 17 Nev. 96; s. c., 28 Pac. Rep. 122.

⁴ *State v. Comm'rs*, 17 Nev. 96; s. c., 28 Pac. Rep. 122.

⁵ *Culbertson v. City of Fulton*, 127 Ill. 30; s. c., 18 N. E. Rep. 781.

again by the council for a less sum, whereupon the bill was duly approved by the mayor. It was held that the bill had been passed within the first quarter.¹ A Colorado statute provides that city councils or boards of trustees of towns shall, during the last quarter of each fiscal year, pass an annual appropriation bill for the next fiscal year, which shall specify the purposes of the appropriations; and that no other appropriations shall be made unless the question is submitted to a popular vote, and that no more shall be appropriated than the estimated revenue for the year. The records of the town being carelessly kept, parol evidence was introduced that such ordinance was passed by the requisite majority on the call for yeas and nays; that it contained amounts for different purposes, including streets, but the amount could not be shown; and that the witness believed that the street appropriation was left contingent on the vote of the people. This was held not sufficient evidence of a compliance with the statute and of the appropriation for street purposes.² It has been held that the statute of Louisiana providing that the council of New Orleans shall not, on any pretext, appropriate funds for the government of the corporation to the full extent of the revenues, but shall reserve twenty per cent. of the revenues with sums, etc., from miscellaneous or contingent sources for permanent public improvements, did not make any exception in favor of a paving contractor, to relieve him from the force of the statute depriving the State courts of authority to enforce payment of a claim against the city not reduced to judgment by *mandamus* to its fiscal officers so as to enable him to coerce the comptroller to issue his warrant, the treasurer to pay it, and the council and these officers to set apart twenty per cent. of the revenues collected for the year, and to confine appropriations for other purposes than public improvements to twenty per cent. of such revenues; since the "revenues" mentioned in the act are not those actually collected, but those estimated in the budget for the year, which is to be formed on the basis of all necessary expenses of the year with the addition of the twenty per cent. authorized by section 66 for public improvements.³

¹ *King v. City of Chicago*, 111 Ill. 63.

² *State v. City of New Orleans*, 40

³ *Sullivan v. City of Leadville*, 11 La. Ann. 299; s. c., 3 So. Rep. 584. Colo. 483; s. c., 18 Pac. Rep. 736.

§ 849. Annual appropriations.— The provision of the charter of a city in Connecticut which calls for an annual classified appropriation by the council of amounts deemed necessary for the expenses of the various departments of the city government, and forbids any city or department officer or board to exceed such appropriations, has been held to be intended for the protection of the city against its officers, and not to prevent the city itself, through the council, from incurring additional expenditures not provided for by annual appropriations.¹ Nor does the statute of Connecticut providing for the punishment of any agent or executive officer of any community who shall wilfully authorize or contract for the expenditure of any money or the creation of any debt in excess of appropriations prohibit incurring expenditures not provided for by the annual appropriations.² The provisions of the Nebraska statute limiting the power of a city council to appropriate money to the annual appropriation bill and to such sums as in the aggregate shall not exceed the amount of tax authorized to be levied during that year do not apply to money authorized to be borrowed by such city for a specific purpose, and where a proposition to apply the same thereto has been sanctioned by a majority of the legal voters of such city, either by a petition signed by them, or at a general or special election duly called therefor.³

§ 850. Appropriation of taxes to sinking fund.— The failure of a county treasurer to set apart the moneys received by him for taxes on a certain railroad as a sinking fund for the redemption of township aid bonds, as required by the statutes of New York, does not give rise to the presumption that he misappropriated the funds in the absence of proof that any part of them has ever been used for any purpose whatever; but the presumption is that they have gone into the general

¹ *Whitney v. City of New Haven*, 58 Conn. 450; S. C., 20 Atl. Rep. 666.

² *Whitney v. City of New Haven*, 58 Conn. 450.

³ *State v. Martin* (1889), 27 Neb. 441, in which a *mandamus* was issued to compel the mayor to sign a warrant on this money to pay an amount for which a claim for constructing water-

works had been compromised; the court holding that the power to compromise and settle claims of that kind existed in the mayor and city council of cities in their legislative capacity, growing out of their general corporate powers and the necessities of such cases.

fund of the county, especially where that has always been considerably in excess of the railroad taxes.¹ The fact that no taxes were specially raised to redeem the township aid bonds, and to create a sinking fund, will not affect the duty of the county treasurer to so apply the taxes paid by the railroad company, as the law itself makes the appropriation.² Where the railroad taxes have remained in the county treasurer's hands without misappropriation, the duty imposed on him by statute to use them as a sinking fund for the redemption of the township aid bonds is continuous; and hence the statute of limitations has no application to an action to compel him so to do, nor is it necessary that the particular moneys paid by the railroad company should be identified.³ The fact that the predecessors of the treasurer failed to make the appropriation of the railroad taxes required by law, and paid them over to their successors in office, will not excuse the treasurer from making the appropriation, as he holds the money by virtue of his office and subject to the duties imposed on him by law.⁴

(c) UNLAWFUL EXPENDITURES.

§ 851. The New York statute providing for investigation.—Unlawful expenditures are not those resulting from errors of judgment or unbusiness-like methods whereby public moneys are wasted, under the statute of New York providing “for the summary investigation of unlawful and corrupt expenditures by officers of towns or incorporated villages and for restraining the same.”⁵ It has been held that the before-mentioned statute is remedial and must be liberally construed.⁶ Also that it was not material in a proceeding under that act that bills, payment of which is sought to be restrained, have been audited by the town board.⁷ Nor does the fact that petitioners have other remedies affect their right to a summary

¹ *Spaulding v. Arnold*, 125 N. Y. 194. See, also, *Matter of Clark*, *Sheldon*, 194; s. c., 26 N. E. Rep. 295; *affirm-* don, 106 N. Y. 104.
ing 6 N. Y. St. Rep. 336.

⁵ *In re East Syracuse*, 20 Abb. N. C.

² *Spaulding v. Arnold*, 125 N. Y. 181.

⁶ *In re Town of Eastchester*, 53

³ *Spaulding v. Arnold*, 125 N. Y. Hun, 181; s. c., 7 N. Y. Supl. 120.

⁷ *In re Town of Eastchester*, 53

⁴ *Spaulding v. Arnold*, 125 N. Y. Hun, 181.

investigation, as the statute specifically gives them this remedy.¹ Under the New York statute providing that the village street commissioners shall employ some one to cut weeds growing in the streets, provided the occupants of premises abutting thereon shall fail to do so within a specified time after written notice, the village trustees cannot be held liable for unlawful expenditure of public moneys in having weeds cut from the streets, unless it appears that they did so without notice to the occupants of the abutting premises.² Proof that men employed to do public work did not work full time will not sustain a charge that the village trustees were guilty of unlawful expenditures where it appears that the trustees did not know this, and that the men worked well when the trustees were present and were idle when the trustees were temporarily absent.³ Where a committee appointed by a town to procure plans and contract for the erection of a school-house at a cost not to exceed a fixed sum authorized expenditures in excess of that sum, the town is not liable for such excess.⁴ And the taking possession and use by a town of a school-house erected on its land is not such a ratification of unauthorized expenditures in its erection as to make the town liable therefor.⁵ And a person contracting with the committee of a town to erect a school-house, excepting certain parts, for an agreed price, in doing extra work under the direction of the committee is bound to take notice of the amount the committee were authorized to expend and of the price to be paid for the parts excepted.⁶ A tax-payer cannot be relieved from the payment of taxes on the ground that they are being improperly expended by the authorities.⁷

(d) CLAIMS.

§ 852. Presentation of claims.—In presenting a claim all that is required is a detailed statement of the items and their

¹ *In re Town of Eastchester*, 53 Hun, 181.

² *In re East Syracuse*, 20 Abb. N. C. 131.

³ *In re East Syracuse*, 20 Abb. N. C. 131.

⁴ *Turney v. Town of Bridgeport*, 55 Conn. 412; s. c., 12 Atl. Rep. 520.

⁵ *Turney v. Town of Bridgeport*, 55 Conn. 412.

⁶ *Turney v. Town of Bridgeport*, 55 Conn. 412.

⁷ *Anderson v. City of Mayfield* (Ky.), 19 S. W. Rep. 598.

dates when necessary to their proper identification.¹ An account rendered against a county by a county assessor for services of a clerk, F., in the following form: "*County of A. to F., Dr.: Services: Assessment, 1886, June, 16 days, \$6, \$96,*"—F. being a clerk of defendant,—is "itemized," as required by the statute of Colorado.² A voucher "for current expenses of the police department \$200, police and all other salaries and current expenses," approved by the board of police commissioners, and duly certified by its president and secretary, has been held not to be "in proper and fully itemized form" which would authorize the auditor of the city to audit and allow it.³ A written order of a county auditor directing the county commissioners to pay one a certain sum for "clerical services rendered in his office from July 1st to Nov. 20, 1875," on which the commissioners simply made an indorsement "examined and approved," was held not to be an audit of an itemized and verified account as required by law.⁴ The provisions of the code of Iowa requiring the presentation of unliquidated demands to the board of supervisors before suit can be brought thereon against a county are applicable to actions for infringement of patent rights.⁵ The bonds and notes of a county issued for loans authorized by law are not open accounts for county charges which must be presented to the board for audit.⁶ The certificate of the judge of the district court that a claim for compensation to counsel appointed by such court to conduct the defense of a person charged with felony has "been examined and allowed by the court" is not conclusive upon the county commissioners as to the amount which should be allowed for such services. They may re-examine the account, and allow so much as they may think just.⁷

§ 853. The same subject continued.—A charter of a city provided that an action against the city could not be main-

¹ Board of Comm'rs v. Wertz, 112 Ind. 268; s. c., 13 N. E. Rep. 874.

² Roberts v. People, 9 Colo. 458; s. c., 13 Pac. Rep. 630.

³ State v. Smith, 89 Mo. 408; s. c., 14 S. W. Rep. 557.

⁴ State v. Appleby, 25 S. C. 100.

⁵ May v. County of Cass, 30 Fed. Rep. 762, following May v. Buchanan Co., 29 Fed. Rep. 469.

⁶ Parker v. County of Saratoga, 106 N. Y. 392; s. c., 13 N. E. Rep. 308.

⁷ Boone Co. v. Armstrong, 23 Neb. 764; s. c., 37 N. W. Rep. 626.

tained until the demand had been presented to the council, and it had had reasonable time to investigate and pass on it. It has been held that a person had waited long enough who did not bring a suit until more than two months after presenting his claim, during which time the council had had four meetings, at which no action was taken in regard to the claim.¹ The claim of a purchaser of land at a tax sale against a county, under the Nebraska revenue law, making the county liable to the purchaser at a tax sale of land which was not subject to taxation for the amount paid by him with interest, is a claim within the statute of Nebraska requiring claims against a county to be presented to the county board, and giving a right of appeal to the district court in case it is disallowed by the board.² The filing of a sworn statement with a board of supervisors by a county superintendent, of the time he has been engaged in discharge of his duties and his necessary expenses, etc., authorized by the code of Iowa, has been held not to be conclusive upon the board, and that the board have a right to examine it the same as other claims.³ The statute of Florida providing that every claim against any county in the State shall be presented to the board of county commissioners within one year from the time it became due or shall be barred does not apply to orders or warrants drawn by the commissioners on the county treasury, but only to such claims as have never been presented, audited or allowed.⁴ Minutes of a meeting of a town board, not held at the time or place prescribed by law for the auditing or allowing of claims, nor at a time or place to which a regular meeting had been adjourned, are inadmissible to establish a claim audited at such meeting.⁵ It has been held that under the New York statute requiring all claims against a town to be audited by the town board, and the statute providing that such claims must, for that purpose, be presented in items and verified by the oath of a creditor, the treasurer of Queens county could not pay

¹ *Whitney v. City of Port Huron* (Mich.), 50 N. W. Rep. 816.

² *Fuller v. Colfax County* (Neb.), 50 N. W. Rep. 1044.

³ *Bean v. Board*, 51 Iowa, 53; s. c., 49 N. W. Rep. 1049.

⁴ *Johnson v. Wakulla County* (Fla.), 9 So. Rep. 690.

⁵ *Jackson v. Collins*, 16 N. Y. Supl. 651.

himself, out of the trust funds in his hands and fees allowed by statutes, for striking off lands to a town at a sale for taxes, without a previous audit of his claim.¹ Interest will begin to run on a claim against a municipal government only from the time of a demand for payment.² A complaint alleging presentation of the claim sued for to the board of supervisors, and that the affidavit accompanying the claim, which was for a certain number of dollars, "is true and correct and that the same is due and owing from the county to defendant," substantially complies with the provisions of the California statute requiring an allegation of the presentation of the claim to the board of supervisors, together with an affidavit "that the amount claimed is fully due," as a condition precedent to maintain an action therefor.³ A complaint in an action against a county which fails to state that the claim on which it is based has been presented to the county court and disallowed as required by statute has been held to be bad on demurrer.⁴ The general statute of Arkansas requiring ordinary demands against counties to be authenticated when presented for allowance in the county court has no application to a demand the right to sue for which is given by special act.⁵ Where a board of county commissioners, upon the advice of competent attorneys, allow certain claims which are not strictly legal charges against the county, their official action in so doing will not render them liable to the charge of corruption or forfeiture of office, if the allowances were honestly made and the board acted merely upon a mistake or error of law as to the liability of the county.⁶

§ 854. The same subject continued — Verification of claim.— A claim for damages for personal injuries is a "claim" within the meaning of the consolidation act of New

¹ *Warrin v. Baldwin*, 105 N. Y. 534; 52 Ark. 430; s. c., 12 S. W. Rep. 877, s. c., 12 N. E. Rep. 49.

² *Donnelly v. City of Brooklyn*, 7 N. Y. Supl. 49.

³ *Rhoda v. Alameda County*, 69 Cal. 523; s. c., 11 Pac. Rep. 57.

⁴ *Fenton v. Salt Lake County*, 4 Utah 466; s. c., 11 Pac. Rep. 611.

⁵ *Perry County v. Conway County*, 23 Pac. Rep. 479.

an action by one county against another, which had received a detached portion of its territory, to recover its proportion of the indebtedness of the plaintiff which the special act provided it should pay.

⁶ *State v. Scates*, 43 Kan. 330; s. c.,

York city, authorizing the comptroller to require any person presenting for settlement an account or claim against the corporation to be sworn before him as to any facts relative to its justness.¹ Under a charter requiring that all claims against the city for injuries shall be presented to the comptroller, duly verified, it is sufficient, in the absence of objection, if the original claim, signed and verified, is shown to the comptroller and a copy left with him.² The mayor is under no legal duty to sign a warrant for the payment of a bill against the city which is passed by the common council without being sworn to as required by the charter.³ Under the California statute providing that a demand against the city treasury shall be barred unless "presented for payment, properly audited, within one month after such demand became due and payable; or, if it be a demand which has to be passed and approved by the board of supervisors," etc., "then within one month after the next regular session of the board held next after the demand accrued," etc.,—a claim for a salary, due at the end of each month, having never been presented for payment, nor presented to the board of supervisors, is barred after the lapse of one month.⁴ In an action against a city of the third class for services, where the evidence shows that the claim was presented to the council and referred to a committee, who reported in favor of the allowance of part of the claim, it will be presumed to have complied with the Kansas statute requiring claims to be presented in writing with a full account of the items, and sworn to be correct, reasonable and just.⁵

§ 855. Presentation of claims for injuries.—A claim for damages against a municipal corporation arising from negligence does not come within the New York statute which provides that "costs cannot be awarded to the plaintiff in an action against a municipal corporation in which the complaint demands a judgment for a sum of money only, unless the

¹ *In re Dasent*, 2 N. Y. Supl. 609.

Francisco, 76 Cal. 325; s. c., 18 Pac.

² *Magee v. City of Troy*, 1 N. Y.

Rep. 397.

Supl. 24.

⁵ *City of Enterprise v. Fowler*, 38

³ *State v. Daly* (N. J.), 13 Atl. Rep. 6.

Kan. 415; s. c., 16 Pac. Rep. 703.

⁴ *Ames v. City and County of San*

claim upon which the action is founded was, before the commencement of the action, presented for payment to the chief fiscal officer of the corporation.”¹ The failure to give the notice required by the Wisconsin statute to be given to the city authorities within ninety days after the happening of injuries resulting from a defect in a street, in order to entitle the party injured to recover against the city, will not defeat an action brought by an administrator to recover against the city for damages for death from injuries resulting from such a defect, when the death occurs within ninety days from the happening of the injury.² A court held pursuant to adjournment is not a new term, but a continuance of the former term; and may, under the New Hampshire statute authorizing it, “at the trial term thereof,” to allow the required statement to be filed with the city clerk, allow a statement of claim against a city for injuries caused by a defective way to be filed at such adjourned session.³ A claim against a village for injuries sustained by reason of the non-repair of a street is not required to be presented to and acted on by village auditors as preliminary to bringing suit, under the New York statutes making such requirement with reference to “all claims and demands of every name and nature,” enumerating, as included therein, those contracted or authorized by village boards and officers.⁴ A claim for damages for an injury sustained by reason of a defective way, or other tort, is not required to be presented to the common council, although the charter of a city gives to that body the exclusive power to make appropriations, and provides that “no claim against the city” shall be paid until it is audited and allowed by the common council.⁵ Under the Massachusetts statute which requires the service of a notice by a person claiming compensation for injuries caused by a defect in a highway on “the mayor, the city clerk, or the treasurer,” a notice handed by the person injured to an alder-

¹ *Gage v. Village of Hornellsville*, 106 N. Y. 667; s. c., 12 N. E. Rep. 817; *Hunt v. City of Oswego*, 107 N. Y. 629; s. c., 14 N. E. Rep. 97.

² *McKeigue v. City of Janesville*, 68 Wis. 50; s. c., 31 N. W. Rep. 298.

³ *Eastman v. City of Concord*, 64 N. H. 263; s. c., 8 Atl. Rep. 822.

⁴ *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459; s. c., 11 N. E. Rep. 43.

⁵ *Sheridan v. City of Salem*, 14 Oregon, 328; s. c., 12 Pac. Rep. 925.

man, who caused it to be acted upon by the board of aldermen, after which it was delivered to the city clerk in the regular course of the business of the board, is sufficiently served.¹ The notice to the town council required by the Rhode Island statute before bringing an action against the town is sufficient, in case of a claim for unliquidated damages, if it states the facts from which the claim arises, though it does not state the amount of the claim.²

§ 856. **Presentation as a condition precedent to right of action.**—Where a charter of a city requires all claims against it for personal injuries to be submitted to the council in writing and that the law department shall consider such claim and report thereon to the council within three months from the date of reference, the presentation of such claim to the council and an opportunity to investigate the same are conditions precedent to the right to maintain an action thereon; and such an action, brought within the three months, without allegations or proof to show lack of diligence in the law department, or any matter affording ground for curtailing the statutory period, cannot be sustained.³ The Arizona statute provides that all claims against a county must be duly presented to the board of supervisors in writing; in another place that “the board may allow the claim in part and draw a warrant for the portion allowed on the claimant’s signing a receipt in full for his account;” again, that a claimant dissatisfied “with the amount allowed him on his account may sue the county therefor.” Where a board allowed a claimant’s claim in part, issued a warrant therefor and entered into a written agreement with him whereby he should receive the warrant and receipt for the same without affecting his right to the further amount not allowed, it was held that the claimant, having ac-

¹ *Wormwood v. City of Waltham*, 144 Mass. 184; s. c., 10 N. E. Rep. 800.

² *Burdick v. Richmond* (1889), 16 R. I. 502. The court said:—“The manifest purpose of the statute is to enable the town council to investigate the claim, and to afford them an opportunity to settle it without subjecting the town to the expense of a

suit. If, therefore, the facts upon which the claim arises are set forth in the notice with sufficient fullness and particularly to enable the town council to make such investigation, the purpose of the statute is answered.”

³ *Jones v. City of Albany*, 17 N. Y. Supl. 232.

cepted an allowance of part of his claim, had no right of action for the balance, the agreement being void.¹ An action will not lie against a county in Arizona for a claim until after it is presented for allowance.² A counter-claim arising under a special act providing that a county should pay to the treasurer of another county formerly a part of it a share of the taxes collected in 1886 within thirty days after the return of the delinquent list has been held not subject to an objection that the claim was not presented to the county board before action was brought for the balance due the new county.³ Where the trustees of a town have considered a claim of a physician under a statute which makes the township liable for relief afforded by him to the poor "only in such amount as the trustees determine to be just and reasonable," and acting in good faith have rejected it, no action can be maintained against the township.⁴ The laws of New York (sec. 1104, ch. 410, Laws 1882) respecting the presentation of claims against the city of New York to the comptroller for adjustment before bringing suit only apply to such claims as can be prosecuted in the State courts by the actions or proceedings mentioned in section 1103.⁵

§ 857. Allowance of claims.—The board of supervisors of a county in passing upon a claim against the county act as a *quasi*-judicial body, and their allowance and settlement of the claim is an adjudication which is conclusive.⁶ It is the duty of a board of supervisors to allow a claim against a county where the amount is undisputed, and its refusal to do so is not a mere error of law, but a breach of duty which the courts will

¹ *Yavapai County v. O'Neil* (Ariz.), 29 Pac. Rep. 430.

² *Yavapai County v. O'Neil* (Ariz.), 29 Pac. Rep. 430.

³ *Lincoln County v. Oneida County* (Wis.), 50 N. W. R. 344.

⁴ *Trustees v. White*, 48 Ohio St. 577; s. c., 29 N. E. Rep. 47. The court said:—"The right of the claimant, in the first instance, is to have the board determine what is just and reasonable; when that is determined,

the amount so ascertained constitutes the legal demand against the township. If nothing is found due, then no legal claim exists." See *Comm'rs v. Ranney*, 13 Ohio St. 388; *Comm'rs v. Osborn*, 46 Ohio St. 271; s. c., 20 N. E. Rep. 333.

⁵ *Gamewell Fire Alarm Tel. Co. v. Mayor &c.*, 31 Fed. Rep. 312.

⁶ *Placer County v. Campbell* (Cal.), 11 Pac. Rep. 602, following *Colusa County v. De Jarnett*, 55 Cal. 375.

remedy by *mandamus*.¹ It was held in Wisconsin that where the action of a county board in allowing a claim against a county is intended to ultimately charge a liability on one of the towns within the county, the town has a right to insist on a substantive compliance with the statute which requires the claimant to file with the county clerk an itemized account stating separately the nature and amount of each item.² It is for the board of county commissioners to fix the time and place where they will consider claims against the county and hear the proof, giving only such notice of their time and place of sitting as occurs in the course of their proceedings, and parties having claims must present due proof thereof, an affidavit that an account is just not being sufficient.³ Under the criminal code of Kansas it has been held that the board of county commissioners may allow a moderate compensation for medical services, fuel, bedding and medical attendance furnished for prisoners committed to the county jail, which shall be paid out of the county treasury; but the allowance of such claims is wholly discretionary with the county board, and the liability of the county for the same can only arise upon an order made by the county commissioners when duly convened and acting as a board.⁴ Under the California statute known as the "Consolidation Act," which provides that any person may appeal from the rejection of his claim by the county auditor to the county board, whose decision thereon shall be final, a writ of mandate may be issued against the auditor to pay a claim allowed by the county board on appeal from a rejection by him, though the rejection may have been justified on its first presentation.⁵

§ 858. The same subject continued — Procedure.— The Dakota statutes which provide for an appeal from the action of the boards of county commissioners in regard to the allowance of claims presented for payment do not give the adverse decision of such a board the force and effect of a final

¹ *People v. Board of Supervisors*, 56 Hun, 459; s. c., 10 N. Y. Supl. 88.

² *Outagamie County v. Town of Greenville*, 77 Wis. 165; s. c., 45 N. W. Rep. 1090.

³ *Hickey v. Oakland Supervisors*, 62 Mich. 94; s. c., 28 N. W. Rep. 771.

⁴ *Hendricks v. Chautauqua County*, 35 Kan. 483; s. c., 11 Pac. Rep. 450.

⁵ *Falk v. Strother*, 84 Cal. 544; s. c., 22 Pac. Rep. 676.

judgment, so as to enable it to be pleaded in bar of an action on such claim.¹ On appeal from the decision of a board of county commissioners in South Carolina refusing to allow a claim, the decision was reversed by the circuit court and the case remanded to the board for further hearing, upon the ground that "it appeared that the respondents did not require such further evidence of the truth and propriety of the charges of the appellant as is required by law." It was held that the provision of the statute designating the method of allowing claims by county commissioners is only permissive and not mandatory as to requiring further evidence, and an omission to require it is not an error of law.² A New York statute authorizes the board of town auditors to audit and allow "the account of all charges and claims payable by their respective towns." Another statute authorizes the board of supervisors "to audit the accounts of town officers and other parties against their respective towns, and to direct the raising of such sums as may be necessary to defray the same." It has been held that their jurisdiction to audit accounts against the town being concurrent, the supervisors could not allow accounts after they had been rejected by the auditors on their merits, though they might allow claims presented in proper form which had been rejected by the auditors because "not itemized."³ A claim by a sole commissioner of highways for money expended in repairing bridges without the authority of the board of auditors, as required by the New York statute, but which the board has audited and allowed, may, on being again presented by the commissioner, be re-examined and passed on by the board.⁴ A county board of supervisors cannot review an audit after the roll has been signed and the warrant delivered.⁵ A petition to the county commissioners is filed when presented to the chairman in the presence of the full board with the request that it be filed, although it is not indorsed by the clerk as filed for an hour afterwards.⁶

¹ *Spencer v. County of Sully (Dak.)*, 33 N. W. Rep. 97.

² *Green v. County of Richland*, 27 S. C. 9; s. c., 2 S. E. Rep. 618.

³ *McCrea v. Chahoon*, 54 Hun, 577; s. c., 8 N. Y. Supl. 88.

⁴ *People v. Barney*, 114 N. Y. 317; s. c., 21 N. E. Rep. 739.

⁵ *People v. Rensselaer County Supervisors*, 34 Hun, 266.

⁶ *Brockton v. Cross*, 138 Mass. 297.

§ 859. The same subject continued — Adjudication by the board.— While commissioners, in passing upon claims against a county, act judicially, it is not essential or even proper for them to enter a formal judgment after the manner of courts of law. It is sufficient if it appear that the claim was duly presented, and that it was allowed or rejected.¹ *Mandamus* will issue in a proper case to compel a county board to act upon a claim against the county where final action has been refused; but in a proceeding in *mandamus* the court will not determine the validity of any offset set up by the county.² To authorize an appeal from the action of a county board in allowing or rejecting claims against the county, it must appear from the proceedings of the board that they have taken final action upon such claim by either allowing or rejecting the same in whole or in part.³ Under the California statute providing that gas inspectors “shall be entitled to a salary to be paid and allowed” by the board of supervisors, a claim for such salary need not be presented to the auditor.⁴ A local Pennsylvania statute fixes the pay of Fayette county auditors at three dollars per day, but gives them no mileage. Another statute fixes the pay of county auditors throughout the State at three dollars per day with a certain allowance of mileage. It has been held that Fayette county auditors are not entitled to mileage under the latter.⁵ Where a statute providing for a boundary commission and the auditing of the expenses of a survey defining the boundary lines between certain counties authorized this commission to ascertain the expense, and to certify the amount to the county commissioners, when it is so ascertained and certified the county commissioners have no power to review the action of the boundary commission or to demand from the surveyor an itemized bill of such expenses.⁶ The allowance of a claim by a city council, with the condition annexed to it, “to be

¹ *Black v. Saunders County*, 8 Neb. 440; s. c., 1 N. W. Rep. 144.

² *State v. Slocum* (Neb., 1892), 51 N. W. Rep. 969.

³ *State v. Slocum* (Neb., 1892), 51 N. W. Rep. 969.

⁴ *Ames v. City and County of San*

Francisco, 76 Cal. 325; s. c., 18 Pac. Rep. 397.

⁵ *Morrison v. Fayette County*, 127 Pa. St. 110; s. c., 17 Atl. Rep. 755.

⁶ *Kornburg v. Board of Comm'rs*, 10 Mont. 325; s. c., 25 Pac. Rep. 1041.

paid when there is money in the treasury to pay with," is binding on the city, and the condition will not defeat an action to recover a judgment thereon.¹ The allowance of a claim by less than a quorum of a city council is validated by a resolution at a subsequent full meeting adopting, ratifying and confirming the proceedings of the prior meeting.²

§ 860. Conclusiveness of adjudication.—The powers and duties of a board of supervisors are executive, not judicial, and its allowance of a claim is not an adjudication and does not bar it from contesting the validity of the claim, and pleading the statute of limitations when a *mandamus* is applied for to compel payment.³ In the absence of fraud or collusion, and where there has been a substantial compliance with the statute, the allowance by a county board of the accounts of commissioners to review the equalization of assessments of a town for their services and expenses is binding upon the town which is chargeable therewith.⁴ But if such accounts

¹ *National Lumber Co. v. City of Wymore*, 30 Neb. 356; s. c., 46 N. W. Rep. 622.

² *Curtis v. Gowan*, 34 Ill. App. 516.

³ *Board of Supervisors v. Catlett's Ex'rs* (1889), 86 Va. 158, where a claim of an agent appointed by a county court in 1863, for an agreed compensation, was presented and allowed in 1871, but not paid, and in 1873 was disallowed. In 1887 a *mandamus* was applied for to compel its payment. It was held that the claim was barred by the lapse of five years between its accrual and the filing of the application. See, also, as to powers of boards in such matters, *Abernathy v. Phifer*, 84 N. C. 711, holding that an allowance of a claim by a county board was not final and conclusive, and that it may be re-examined by the board itself; *Gurnee v. Brunswick County*, 1 Hughes, 270, where Chief Justice Waite said:—"The board are the representatives of the people elected to supervise the business of the county, which has been by law com-

mitted to their care. They constitute a branch of the executive department, not of the judiciary. . . . When an account is presented to them, it is for allowance, not for adjudication. In settling and allowing they do not act judicially. . . . Their duties are purely administrative." To the same effect Judge Dillon in *Heisk v. Pulaski County*, 4 Dill. 209, ruling that an allowance by a board of supervisors did not estop the county from setting up a defense to the claim when subsequently sued upon it. See, also, *Webster County v. Taylor*, 19 Iowa, 117; *Clark v. Des Moines*, 19 Iowa, 199; *Clark v. Polk County*, 19 Iowa, 248; *School Dist. v. Lombard*, 2 Dill. 493; *Keller v. Leavenworth County*, 6 Kan. 510; *Goodnow v. Ramsey County*, 11 Minn. 31; 1 Dillon on Munic. Corp., § 412; *Mayor of Nashville v. Ray*, 19 Wall. 468; *High's Extr. Leg. Rem.*, § 354.

⁴ *Outagamie County v. Town of Greenville* (1890), 77 Wis. 165.

are not properly itemized, as required by the Wisconsin statute, their allowance by the county board is not binding upon such town.¹ An account for "seventy days' service as commissioner, \$280;" and one for "fifty days' service of livery for commissioners, at \$4.50 = \$225," it appearing that such services were performed between May 9 and August 8, 1888, were held to have been sufficiently itemized, although they did not give the date of each day's service. But an account for "hotel expenses and railroad fare, etc., \$171.42," was held not sufficiently itemized.² And such commissioners being empowered to conduct their proceedings "after the usual manner of a judicial hearing," may, within reasonable limits, make a view of the real estate in a county, and are properly entitled to their *per diem* and necessary expenses while so engaged.³

§ 861. Proceedings after disallowance of claim.— Claims for damages for torts against a city are not embraced in the words "claim or demand" in the statutes which are to be allowed or disallowed by a common council and an appeal allowed therefrom. Certain steps are to be taken under the statute which are a condition precedent to a right of action for a tort; but when a "claim or demand" arising *ex contractu* is disallowed by an appeal only is the action maintained on it.⁴ And though a circuit court may have jurisdiction of the subject-matter and of the person by the consent of the parties in such an appeal, it should dismiss the appeal where it has not obtained jurisdiction over it in accordance with the statute.⁵ In

¹ Outagamie County v. Town of Greenville, 77 Wis. 165.

² Outagamie County v. Town of Greenville, 77 Wis. 165.

³ Outagamie County v. Town of Greenville, 77 Wis. 165.

⁴ Vogel v. City of Antigo (Wis., 1892), 51 N. W. Rep. 1008. See, also, Bradley v. City of Eau Claire, 56 Wis. 168; s. c., 14 N. W. Rep. 10; Kelley v. City of Madison, 43 Wis. 638; Ruggles v. City of Fond du Lac, 53 Wis. 436; s. c., 10 N. W. Rep. 565. In Sheel v. City of Appleton, 49

Wis. 125; s. c., 5 N. W. Rep. 27, the decision to the contrary was based altogether on the broad words in the charter as to submitting to the council for allowance or disallowance "claims or demands of any kind whatever, whether arising from contract or otherwise," which this court held to embrace torts.

⁵ Vogel v. City of Antigo (Wis., 1892), 51 N. W. Rep. 1008. See, also, Manuf. Co. v. Rosey, 69 Wis. 246; s. c., 34 N. W. Rep. 85; Fleming v. City of Appleton, 55 Wis. 90; s. c., 12 N. W.

a case where a physician sued a county for a medical bill, it was argued that the evidence did not support the verdict because it failed to show a presentation to the board of commissioners and a disallowance by them before suit brought. To this the court said:—"This relates solely to the matter of jurisdiction, and the presumption in favor of the jurisdiction of the circuit court is such in all cases as to cast the burden of its overthrow upon him who denies it."¹

§ 862. Malfeasance in over-allowance.—The statute of Kansas providing that the compensation of each county commissioner for attending the regular and special meetings of the board shall not exceed \$100 in any one year does not prevent the members of the board of county commissioners from charging additional compensation while attending meetings to equalize assessments, to levy taxes or to canvass the returns of elections; and an indictment of a county commissioner for receiving for his services more than \$100, and the testimony offered in support thereof, should show that such compensation was received by him for only attending the regular and special meetings of the board.² An indictment of defendant, as chairman of a board of county commissioners, for unlawfully, wilfully and corruptly voting for and allowing a claim against the county in a larger sum than was due is not sustained by testimony showing that all the members of the board voted for and allowed the claim in the proper sum, but that the chairman, without any other vote or direction, issued a county warrant for more than the amount so allowed.³

Rep. 462; *Watson v. City of Appleton*, 62 Wis. 267; s. c., 22 N. W. Rep. 475.

¹ *Board of Comm'rs v. Osborn* (Ind., 1892), 31 N. E. Rep. 541; *Brass Foundry v. Board &c. of Parke County*, 115 Ind. 239; s. c., 17 N. E. Rep. 593; *Board v. Leggett*, 115 Ind. 544; s. c., 18 N. E. Rep. 53.

² *State v. Corning* (1890), 44 Kan. 442; s. c., 24 Pac. Rep. 966. See, also, *Burroughs v. Comm'rs*, 29 Kan. 196.

³ *State v. Corning*, 44 Kan. 442; s. c., 24 Pac. Rep. 966. See, also, *State v.*

Spidle (1890), 44 Kan. 439; s. c., 24 Pac. Rep. 965, holding that where an indictment charged the defendant, a member of the board of county commissioners, with corruptly voting for and allowing a claim in a sum too large, it was error to permit the introduction of evidence to prove that a warrant had been issued in payment of said claim in a sum larger than the amount of the claim as allowed without proving that the defendant voted to issue the warrant for said larger sum.

§ 863. Proper and improper charges against a county.—

A county has been held liable in an action on a claim of its county clerk for money paid out by him for the service of assistants in bringing up the work of his office neglected by his predecessor, under the code of Iowa, which provides that "when a county officer receiving a salary is compelled by the pressure of the business of his office to employ a deputy the board of supervisors may make a reasonable allowance to such deputy."¹ When a statute made it the duty of the collector of taxes to execute deeds of lands struck off to a Territory at tax sales without charge, the fees of a notary public for certifying the acknowledgment of such deeds were held not to be a proper charge against the county.² It is not error to refuse an attorney's application for allowance of a fee against the county for services in a suit wherein the county tax collector was a party, it not being shown that he was appointed by order of the court, under the Arkansas statute providing for an allowance to the collector for attorney's fees and expenses incurred in defending suits against him for performing his duty.³ Services performed at the request of a judge of a county, acting as a committing magistrate, in taking testimony in the case of the State against another party, do not constitute a claim against the county; and a judgment rendered against the county in justice's court upon such a claim, where it has not appeared and answered in the action, will be reversed on writ of review.⁴ A board of county supervisors which has provided suitable accommodation for the surrogate cannot be compelled to pay for other accommodations.⁵

§ 864. The same subject continued.— On appeal from a decision of the board of county commissioners allowing a claim for services voluntarily rendered in constructing a public levee, it is a question of law for the court to determine upon all the facts whether the decision appealed from made an allowance for

¹ *Gamble v. Marion County* (Iowa, 1892), 52 N. W. Rep. 556, following *Harris v. Chickasaw County*, 77 Iowa, 345; s. c., 42 N. W. Rep. 313.

² *Heney v. Pima County* (Ariz.), 17 Pac. Rep. 263.

³ *Simmes v. Chicot County*, 50 Ark. 566; s. c., 9 S. W. Rep. 308.

⁴ *Union County v. Slocum*, 16 Oregon, 237; s. c., 17 Pac. Rep. 876.

⁵ *People v. Montgomery County Supervisors*, 34 Hun, 599.

voluntary services, which is within the discretion of the board, and from which no appeal lies.¹ The county court (which is in Arkansas the ruling power in county government) has no authority to order the payment in advance of any part of the amount contracted to be paid for the building of a courthouse or jail before any part of the contract is performed.² And a tax-payer has a right to appeal from an order to pay in advance for such work, as it would amount to an allowance by the county authorities.³ The statute of Iowa names the June meeting of each even-numbered year as the date of fixing the salary of county attorneys by the supervisors of counties. It has been held that where an order increasing such salary has been adopted, any resident and tax-payer of a county might maintain an action by *certiorari* to reverse such order.⁴ The fact that services performed by a county auditor may be regarded by him and by the board of commissioners as "extra services" does not warrant the board in allowing him compensation beyond that provided for by statute.⁵ It has been further held that a county auditor was not entitled to compensation from the county for filing papers.⁶ The Missouri constitution and the charter of St. Louis prohibiting the increasing of an officer's salary during his term has been held to apply to the assessor and collector of water rates, and to the time during which he holds over after the expiration of his four years' term.⁷

¹ *Gemmil v. Arthur*, 125 Ind. 258; s. c., 25 N. E. Rep. 258, it being held that where parties voluntarily construct a levee on private property subsequently dedicated to the public, the power of the board of county commissioners to reimburse them depended wholly upon whether the board could have employed them to do the work at the time it was done, and unless it had power to do so its allowance of a claim for such services was illegal, however beneficial the work may have been to the public; and any tax-payer feeling aggrieved might have relief by appeal. See as to allowances where the boards could have constructed, *Waymire*

v. Powell, 105 Ind. 328; *Miller v. Embree*, 88 Ind. 133.

² *Armstrong v. Truitt* (1890), 53 Ark. 287. See, also, *Shirk v. Pulaski County*, 4 Dill. 209; *Desha County v. Newman*, 33 Ark. 788; *Goyne v. Ashley County*, 31 Ark. 552; *State v. Hinkle*, 37 Ark. 540.

³ *Armstrong v. Truitt* (1890), 53 Ark. 287.

⁴ *Goetzman v. Whitaker* (Iowa), 46 N. W. Rep. 1058.

⁵ *Board of Comm'rs v. Johnson*, 127 Ind. 238; s. c., 26 N. E. Rep. 821.

⁶ *Stiffler v. Board of Comm'rs* (Ind.), 27 N. E. Rep. 641.

⁷ *State v. Smith*, 87 Mo. 158.

§ 865. **Apportionment of indebtedness upon division of a county.**— Wisconsin statutes authorized a certain county to borrow of the trust fund of the State money to aid the construction of a railroad, payable in fifteen annual instalments. The railroad company was required to pay into the State treasury a percentage of its gross earnings in lieu of license fees, the amount to be credited on the county loan. By statute a new county was formed out of part of this county, the public property divided, and the county railroad loan apportioned; new certificates of indebtedness to the State being issued. No provision as to the apportionment of the amount paid into the treasury by the railroad company was made. It was held that the sum should be apportioned between the counties in the ratio of the portions of debt assumed by each.¹ Where a county court of a county in Arkansas from which another was afterwards formed had directed commissioners to pay certain proportions of the contract price for building a jail as the work progressed, until the "walls were up and the building inclosed," and to retain the balance until its completion, and at the time when the county was divided the building was inclosed, it was held to be a fair inference, in ascertaining the amount of indebtedness to be apportioned between a new and the old county, that the amount authorized to be paid for the jail up to that time had been paid, though the commissioners' report was not filed until two months after the division, and failed to show the date of payments.² Under the constitution of Colorado providing that, "in all cases of the establishment of new counties, the new county shall be held to pay its ratable proportion of all the then existing liabilities of the county or counties from which such new county shall be formed," the legislature may itself ascertain or determine what such ratable portion is, but it is eminently proper to remit the matter to the local authorities.³ A Montana statute creating a new county from two old counties apportioned a part of the debt of one of the latter to the new county, amounting to \$30,000, and provided that commissioners of the new county should

¹ *State v. Harshaw*, 73 Wis. 211; *County*, 51 Ark. 344; s. c., 11 S. W. s. c., 40 N. W. Rep. 641.

Rep. 478.

² *Hempstead County v. Howard* ³ *In re House Bill No. 231*, 9 Colo. 624; s. c., 21 Pac. Rep. 472.

cause to be issued at their first regular session warrants on the general fund for said amount; which warrants, if not paid when presented to the treasurer, should be indorsed, "Not paid for want of funds," and thereafter bear interest; or the commissioners "may issue coupon bonds of said county, bearing interest at not more than six per cent. per annum, payable in seven years, and due in fifteen years, in payment of said debt, and to pay current expenses for the first year. Said bonds shall not be sold for less than par, and shall be issued as near as may be in conformity with general law." It was held that the statute did not give the commissioners of the new county the right to elect to pay the indebtedness by issuing coupon bonds and turning them over to the old county in payment; but if they elected to issue coupon bonds, they were required to negotiate them, and pay the proceeds to the old county.¹

§ 866. Claims of contractors for extra work.—Contractors constructing a free gravel road on a contract with the board of commissioners of a county, who with their engineer made a change of contract which necessitated extra work done at their request, can recover of the county for such extra work. And such action cannot be resisted on the ground that the board had no authority to change the contract.² The court said:—"It has been held that even where the cost of an improvement is to be paid directly by property owners, the municipal authorities have some discretion as to directing changes in the contract, or in the mode of doing the work; and as shown in the cases referred to, this discretion must necessarily exist, or the work may become utterly valueless because of some unforeseen cause."³ Under the statutory provisions in Indiana it has been repeatedly held that a contractor

¹ *Territory v. Board of Commissioners*, 8 Mont. 396; s. c., 20 Pac. Rep. 396.

² *Board of Comm'rs v. Newlin* (Ind., 1892), 31 N. E. Rep. 465.

³ *Board of Comm'rs v. Newlin* (Ind., 1892), 31 N. E. Rep. 465. See *Sims v. Hines*, 121 Ind. 534; s. c., 23 N. E. Rep. 515, where it was held that the

governing body of a city may, within reasonable limits, modify and change contracts for the improvement of streets. *Board v. Silvers*, 22 Ind. 491; *Hellenkamp v. City of La Fayette*, 30 Ind. 192; *Ross v. Stackhouse*, 114 Ind. 200, 203; s. c., 16 N. E. Rep. 501; *Elliott on Roads and Streets*, 484.

with a municipality may be paid for extra work in cases where it becomes necessary and is properly ordered.¹ The claim of a contractor for extra work in constructing a gravel road does not constitute a general debt of a county.² But while this is true it is also true that where the contractor shows that the board made a contract with him, that he performed his part of the contract, and that the board refused payments for the sum due, a *prima facie* case is stated.³

§ 867. Claims for services to indigent persons.—A bill of items of services presented to a board of county commissioners in South Carolina by a physician enumerated several examinations of persons for lunacy, but the verification thereof did not state that such persons were paupers, nor that the examinations were made at the request of the proper officers. It was held that the bill was properly rejected by the commissioners.⁴ A physician attended a boy who had been injured by a railroad train, and the boy being unable to pay the railroad company refused to pay the physician's bill. The bill was approved as correct by two justices of the peace, and the physician sued the poor district. It was held that the physician was entitled to recover from the district compensation for his services.⁵ A. and B., physicians, rendered medical and surgical services to indigent poor persons in a county in cases of emergency. A. also had a contract with a railroad company to attend professionally persons injured on the railroad within certain limits, "if called upon by the general superintendent or officer or employee representing it." A. and B. charged the county with the cases to which they had attended. The county claimed that it was not liable for serv-

¹ Board v. Fullen, 111 Ind. 410; s. c., 12 N. E. Rep. 298; Spidell v. Johnson, 128 Ind. 235; s. c., 25 N. E. Rep. 889; Martin v. Neal, 125 Ind. 547, 555; s. c., 25 N. E. Rep. 813; Rogers v. Voorhees, 124 Ind. 464, 471; s. c., 24 N. E. Rep. 374; Board v. Fullen, 118 Ind. 158; s. c., 20 N. E. Rep. 771; Board v. Hill, 115 Ind. 316; s. c., 16 N. E. Rep. 156; Board v. Fahlor, 114 Ind. 176; s. c., 15 N. E. Rep. 830.

² Strieb v. Cox, 111 Ind. 299; s. c., 12 N. E. Rep. 481; Vigo Tp. v. Board of Comm'rs, 111 Ind. 170; s. c., 12 N. E. Rep. 305; Spidell v. Johnson, 128 Ind. 235; s. c., 25 N. E. Rep. 889.

³ Board of Comm'rs v. Newlin (Ind., 1892), 31 N. E. Rep. 465.

⁴ Green v. County of Richland, 27 S. C. 9; s. c., 2 S. E. Rep. 618.

⁵ Poor District v. Byers (Pa.), 11 Atl. Rep. 242.

ices rendered in those cases of injuries incurred on the railroad. It was held liable for services rendered to all persons in the county, except such as A. had been called upon to attend by the general superintendent, officer or employee of the railroad company.¹ A husband abandoning his wife she becomes the head of the family, and aid furnished to her children at her request is aid furnished to her, and chargeable to the town of her settlement.² A wife cannot recover of a town for the support of her husband's father, who lived in the family, where the town, with her knowledge and consent, paid her husband by the month for such support, it appearing that her services were rendered on account of her husband and as his wife.³ A village organized under the general laws of Wisconsin which makes no provision for the support of the poor therein is liable to the town in which it is situated for certain license moneys received, under the Wisconsin statute which provides that "all such license moneys received by any village which under its charter does not provide for the support of the poor therein shall be paid to the town treasurer of the town in which the village is situated."⁴ County superintendents of the poor are bound to pay for the services of an attorney employed by them in bastardy proceedings. They have no power to audit and cut down a reasonable charge, notwithstanding their general power to audit claims.⁵

§ 868. Proceedings to enforce payment of judgments.—

A judgment against the city of New Orleans, reversible only in an appellate court, and not affected by any appeal, either suspensive or devolutive, was, within the two years allowed by the United States statute for writ of error, capable of registration under the act of the legislature of Louisiana abolishing execution against the city, and substituting therefor registration, since execution might have issued thereon be-

¹ *Directors of Poor v. Donnelly* (Pa.), 7 Atl. Rep. 204.

² *Town of Rockingham v. Springfield*, 59 Vt. 521; s. c., 9 Atl. Rep. 241.

³ *O'Keefe v. Northampton*, 145 Mass. 115; s. c., 13 N. E. Rep. 382.

⁴ *Town of Plainfield v. Village of Plainfield*, 67 Wis. 525; s. c., 30 N. W. Rep. 672.

⁵ *Neary v. Robinson*, 98 N. Y. 81; reversing s. c., 27 Hun, 145.

fore the act.¹ If a county court in Missouri, in levying and collecting a tax to pay a judgment obtained against the county, does not proceed in the manner in which it is by statute required to do in such cases, the judges may be enjoined. The fact that the levy is being made in pursuance of a mandate of a federal court, in which the judgment was obtained directing it, is immaterial.² When a judgment is recovered against a county for a valid debt evidenced by warrants duly issued by county authorities, they have power to levy a tax to pay the debt, and though reduced to judgment a county treasurer should not be enjoined from paying such indebtedness with the money raised for that purpose, as the warrants are undoubted evidence of the debt.³ In a proceeding against a city to compel payment of a judgment in full by peremptory *mandamus*, it is no defense that the city had provided a revenue by a proper levy, which had not been collected, where it was shown that the city authorities had full power to require the collector to pay over moneys in a reasonable time if collected, or, if not, to remove him and appoint another collector.⁴ The court declined to decide in advance the legal *status* of a judgment obtained upon county warrants, void because issued after the limit of constitutional indebtedness had been reached, in an action to compel the receiving of such warrants in payment of taxes.⁵ Under the Michigan statutes providing that city supervisors, upon receiving a properly certified transcript of a judgment against a city, shall assess the same as a part of the city tax upon the then next city tax-roll, it is not necessary that the city council or the county supervisors should authorize the same to be assessed, but it is the duty of the supervisors of the city to apportion the same among the wards of the city within a reasonable time after receiving such transcript.⁶

¹ *United States v. City of New Orleans*, 81 Fed. Rep. 537.

² *State v. County Court (Mo.)*, 3 S. W. Rep. 844.

³ *Bush v. Wolf (Ark.)*, 17 S. W. Rep. 709.

⁴ *City of Houston v. Voorhies (Tex.)*, 8 S. W. Rep. 109.

⁵ *People v. May*, 9 Colo. 414; s. c., 15 Pac. Rep. 36.

⁶ *Shippy v. Wilson (Mich., 1892)*, 51 N. W. Rep. 353. The court said:—
“The common council have no power to pass upon its [the judgment’s] validity or to prevent its assessment. It would be within the province of

§ 869. **Mandamus to county officers.**—A city, by ordinance, extended a water-main through a street, the expense to be borne by the property benefited. The county supervisors refused to levy a tax for the amount due the city for the county property on the street. A trial of a *mandamus* to compel a levy resulted in judgment for defendant on account of informalities in the proceedings of the city council. Afterwards in a statute it was provided that the board of supervisors should be authorized, by majority vote, to raise by a tax the amount due the city for the water-main; it was held that the statute was passed to enable the supervisors to discharge a just claim, and *mandamus* would lie to compel them to perform the duty.¹ The words “by a majority vote of said board,” when considered with the general provisions of the act and its title, “An act to authorize the board . . . to raise by tax, and . . . reimburse the city,” require the construction rendering it mandatory, and the power conferred by it a duty imposed on the board.² An ordinary of a county in Georgia, being authorized by law to raise funds for a certain purpose, followed his authority and had the funds deposited with the county treasurer, who, upon demand and presentation of the orders approved by the ordinary, refused to pay the same. It was held, in an action for *mandamus*, that the treasurer, in the absence of a pretense of fraud or mistake as to the orders, should not go back of the directions of the ordinary, and the *mandamus* should issue.³ Under the New Jersey criminal procedure act, providing that all necessary expenses incurred by the prosecutor of pleas in securing the arrest and prosecution of criminals, when approved by

the council to insert the amount of this judgment in its annual appropriation bill and to certify it to the clerk of the board of supervisors, and this would be a very proper thing to do; but by neglecting to do so, it can neither defeat nor postpone its collection or assessment. . . . The board of supervisors cannot, by any neglect or refusal to act upon the assessment of this judgment, defeat or defer its collection. Their approval

is not necessary to its levy upon the taxable property of the city.” They have no more power than the city council to annul a judgment of a proper court.

¹ *People v. Board of Supervisors*, 1 N. Y. Supl. 460.

² *People v. Board of Supervisors*, 1 N. Y. Supl. 460.

³ *Shannon v. Reynolds*, 78 Ga. 760; s. c., 3 S. E. Rep. 653.

the presiding judge of the court of oyer and terminer, shall be paid by the board of chosen freeholders of the county, such a claim, so certified, does not need to be audited, and *mandamus* will not lie against the county auditor to compel him to audit it.¹ An account having been duly allowed against a county, in a case where the county board had jurisdiction, if the board fails to include it in its estimates of the taxes to be levied for the ensuing year, it may be compelled by *mandamus* to do so.² The amount of bonds of a municipality and rate of interest being fixed, a demand on the auditor to compute the amount necessary to be paid by each tax-payer for the purpose of paying the annual interest is sufficient to authorize *mandamus* to compel him to perform his duty, without any formal assessment of the amount by the board.³

(e) WARRANTS.

§ 870. Character of warrants as evidences of indebtedness.—An order on the treasurer of a county being a direct liability of the county, and although negotiable in form, no demand or notice is necessary to fix the county's liability thereupon.⁴ A claim upon a county duly allowed and certified to in the form of a draft by one or more officers on another is an adjusted liability of the county on which it may be sued by an alien in a federal court.⁵ The cancellation of county warrants and the issuance of new ones in lieu thereof does not conclude a county as to equitable defenses.⁶ County warrants in Arkansas are not negotiable paper in any other sense than that they are transferable by delivery.⁷ A special statutory execution against a county in Pennsylvania operates as an injunction upon commissioners restraining them from drawing any warrant or making any payment for any

¹ State v. Applegate (N. J.), 8 Atl. Rep. 505.

² State v. Cather, 22 Neb. 792; s. c., 36 N. W. Rep. 157.

³ State v. Bacon (S. C.), 9 S. E. Rep. 765.

⁴ Lyell v. Supervisors (1855), 6 McLean, 446, 459. A county order is not a bill of exchange or draft.

⁵ Lyell v. Supervisors (1855), 6 Mc-

Lean, 446, 459. And *assumpsit* is the proper remedy for a demand on a county which has been duly audited and liquidated by an order for payment on the treasurer.

⁶ Wall v. County of Monroe (1880), 103 U. S. 74, 79.

⁷ Wall v. County of Monroe (1880), 103 U. S. 74, 79.

purpose whatever, until the judgment upon which it was issued is satisfied.¹ After the service of a *mandamus* execution upon county commissioners in Pennsylvania, the county treasurer has no authority to receive county orders of a date subsequent to the rendition of the judgment in payment of taxes, and thus divert the funds of the county from the appropriation of them made by law for the payment of the execution.² Where a *mandamus* execution authorized by the statutes of Pennsylvania has been served upon county commissioners, it is their duty: (1) If there be any money in the treasurer's hands unappropriated the exigencies of this writ require it to be paid to the party. (2) If there be not money enough in the treasury to satisfy the whole judgment, it is their duty to pay it out of the first money received. (3) If the taxes of the current year are insufficient to pay the judgment and other expenses of the county, it is their duty to assess and collect on the next year sufficient for this purpose. (4) The judgment of the court is an appropriation of all the money in the treasury not already drawn or appropriated by previous county orders in payment of previous demands audited and allowed by the comptroller, and also of the first money thereafter received for the use of the county.³ Although private persons may enjoin the collection of illegal taxes by a municipality, they cannot on their own behalf restrain the disposition of municipal funds derived from taxes already collected.⁴ A school district issued fraudulent warrants in payment for the erection of school-houses, etc. They were purchased by a third party with knowledge that there was wrong in their issue at fifty cents on the dollar. He brought suit, and by collusion with officers obtained a judgment for their face value. This judgment on a bill filed for the purpose was set aside for fraud and a decree made as prayed, for what was deemed equitably due for the consideration received by the district.⁵

¹ Pollock v. Lawrence County, 2 county orders by the treasurer was a
Pittsb. R. 137. If the county has no contempt of the *mandamus* execu-
unappropriated moneys, a special tion issued by the court and punish-
statutory execution must be paid able as such.

"out of the first moneys that shall be received for the use of said county."
² Loute v. Allegheny, 2 Pittsb. R.
412, holding that such payment of

³ Loute v. Allegheny, 2 Pittsb. R.
412.

⁴ Coulson v. Portland, Deady, 481.

⁵ School District v. Lombard, 2

§ 871. **How drawn.**—The charter of Denver divides sewers into three classes,—public, district, and private,—and provides that the cost of public sewers shall be met by an appropriation out of the public revenue. The only provision made for payment of the cost of district sewers is by assessment on the lots of the district, to be collected like other taxes. It also requires warrants drawn by the city government to specify out of what funds they are payable. It was held that, on the presumption that officers do their duty, a warrant, not expressed as payable out of the public sewer fund, but “out of the 20th St. sewer fund, on account of the 20th St. sewer cont.,” is drawn on a particular district fund, and that the city could not be sued thereon without an allegation that there was money in that fund to pay it.¹ Under the California statute authorizing the auditor of San Francisco to audit sums allowed and ordered by the board of supervisors, by authority of the act, and giving the board power to order judgments against the city and county to be paid, where the board has ordered payment of a judgment to the judgment creditor, the auditor cannot draw the warrant in favor of an assignee of the judgment, although he had notice of the assignment.² In 1858 the legislature of Louisiana adopted a system of drainage for the city of New Orleans, the work to be controlled by commissioners, and the expense to be defrayed by assessments on the land benefited. A statute abolished the boards of commissioners and intrusted the control of the work to the board of administrators of the city. The assessments collected were to be used only as a drainage fund, and the expenses paid by warrants payable therefrom.

Dill. 493; the court holding that warrants of this character had not the quality of negotiable paper which prevented an inquiry into its fraudulent character or its condition when in the hands of innocent holders for value before due. Citing *Clark v. Des Moines*, 16 Iowa, 199; *Clark v. Polk County*, 19 Iowa, 248; *Shepherd v. District Tp.*, 22 Iowa, 595; *Taylor v. District Tp.*, 25 Iowa, 447. In this respect such warrants are unlike authorized negotiable bonds issued by

public or municipal corporations. The holders of these warrants are in no better situation than the payee, and they are open to all defenses which might have been made against the party to whom they were originally issued.

¹ *Travelers' Ins. Co. v. City of Denver*, 11 Colo. 434; s. c., 18 Pac. Rep. 556.

² *Scheerer v. Edgar*, 76 Cal. 569; s. c., 18 Pac. Rep. 681.

A constitutional amendment taking effect afterwards prohibited the city from increasing its indebtedness, but allowed the increase of the debt of the drainage fund. Warrants to complainants were drawn on the drainage fund after the adoption of said amendment. It was held that the city could not be made liable for the amount of the warrants as a municipal corporation, for mismanagement of the drainage fund, whereby a deficit occurred so as to increase its general indebtedness.¹ The same rule, it was held, applied to warrants issued for the purchase of machinery authorized by a statute which required payment to be made by warrants on the drainage fund.² Also, that the city would not be liable on the theory that it had falsely held out that there was a fund available for the payment of the warrants.³ Nor would failure to collect the assessments and complete the drainage render the city liable for the amount of the warrants when it appeared that the assessments had been uncollected by the commissioners, before the city took charge of the work, for thirteen years, and that they were uncollectible without incurring cost equal to their amount, and that the system of drainage was itself so impracticable that failure to complete it was inevitable.⁴

§ 872. Mandamus to compel the signing of a warrant.—

A mayor having vetoed an appropriation by a city council to pay for the services of a stenographer employed by its committee to report the evidence as to the right of contesting parties to a seat in that body, the council passed it over the veto. A *mandamus* was ordered to compel the mayor to countersign a warrant drawn for such appropriation.⁵ It was

¹ *Peake v. City of New Orleans*, 38 Fed. Rep. 779.

² *Peake v. City of New Orleans*, 38 Fed. Rep. 779.

³ *Peake v. City of New Orleans*, 38 Fed. Rep. 779.

⁴ *Peake v. City of New Orleans*, 38 Fed. Rep. 779. And the city having retired bonds issued on the drainage fund as authorized by act 1872, No. 73, and issued in lieu thereof its own bonds, it would be entitled to a credit for the amount of which it had re-

lieved the drainage fund, though the act required the bonds retired to be replaced by bonds payable out of the same fund.

⁵ *State v. Haynes* (1887), 50 N. J. Law, 97. There was a recognition of the claim by the action of the council and a due appropriation of money to pay it. See *Ahrens v. Fiedler*, 43 N. J. Law, 400, where the charter of this city was examined, and it was determined that whenever an appropriation of money from the city

held, however, in another case that a mayor is under no legal duty to sign a warrant for the payment of a bill against the city which was passed by the common council without being sworn to as required by the city charter.¹ A school voucher issued by a county superintendent was filed in the county commissioners' court for audit, and after the court had allowed the claim the county judge under its direction indorsed it, "AUGUST 13, 1883. The court finds \$291.31 due on this claim. [Signed] J. B., County Judge." No formal entry of this action was then made on the record kept of ordinary proceedings. The commissioners at a subsequent term, and without notice to the holder of the voucher, entered an order that as there was no money in the treasury no warrant should issue. It was held that *mandamus* would lie to compel the issue of a warrant on the county treasurer, to be paid out of the general fund.²

§ 873. Duty of officers in drawing warrants.— Where the law makes it the duty of a county auditor at a certain time to draw his warrant on the county treasurer, it is his duty to do it without waiting for a request from the person entitled to it.³ County officers have no authority to bind the county to pay more in county warrants than the cash value of the

treasury has been duly made, the duty of the mayor in signing a warrant to draw the money was a ministerial one, enforceable in a proper case by *mandamus*.

¹ *State v. Daly* (1838), 50 N. J. Law, 356. The facts were that the bill according to the statute had been properly itemized and sworn to before the city treasurer, but when passed by the council the *jurat* had not been signed by the treasurer. The action of the council was held irregular, and under the authority of *Langstaff v. Daly*, 49 N. J. Law, 356, this ruling was made.

² *Brown v. Ruse*, 69 Tex. 589; s. c., 7 S. W. Rep. 489. It has been held in Florida that county commissioners cannot be compelled by *mandamus*

to issue a warrant as a reward for killing a wildcat until the county judge has certified in terms of the statute that the scalp was exhibited to him within ten days after the killing. A certificate that the person claiming the reward represented that the animal was killed within the time prescribed was insufficient. *Johns v. County Comm'rs* (Fla., 1891), 10 So. Rep. 96. The court said:—"He has no right to compel respondents to issue the warrant until he has complied with all that the statute requires as conditions precedent to the accruing of his right to the warrant." See, also, *Canova v. Comm'rs*, 18 Fla. 512; *State v. Cooper*, 20 Fla. 547.

³ *Wilson v. Neal*, 23 Fed. Rep. 129,

thing to be paid for, though such warrants are depreciated.¹ Under the code of Mississippi, requiring an order of the board of supervisors allowing a claim against a county to be entered on the minutes, specifying the amount allowed, the page and section of the law under which the allowance is made, etc., and the clerk to issue a warrant for the amount, the clerk is justified in refusing to issue such warrant where the order fails to state the names of the parties and the section of the law, as required.² In drawing warrants upon the county treasurer for the several funds in his hands apportioned to the several townships, the county auditor does not act as the agent of the county, but as a governmental agent for the benefit of the townships, and, not being drawn to satisfy a county or corporate obligation, they create no liability against the county.³ A county treasurer is not subject to penalty under the Nebraska statutes for failure to register a warrant presented to him within ten days after it is issued, that being the time in which an appeal may be taken by a tax-payer, and within which the county clerk is prohibited from delivering the warrant.⁴

§ 874. **Validity of warrants.**—It has been held in Alabama that provisions purchased and used for the support of the indigent in a Confederate State during the war, but not used in promotion of the Confederate government, constitute a valid consideration for a warrant.⁵ Where a county made an illegal contract for the purchase of corn, a part of which was not delivered, and subsequently purchased and used the undelivered portion for a legal purpose, giving a warrant therefor, the consideration of the warrant was held to be valid, the former illegality being purged by the new and legally executed contract.⁶ A plaintiff in a case in North Carolina claimed to have lost a county order, and the defendant county, pursuant to resolution, issued a duplicate, which was never taken by plaintiff, the original having been found. Subsequently the

¹ Dorsey County v. Whitehead, 47 Ark. 205; s. c., 1 S. W. Rep. 97.

² Land v. Allen, 65 Miss. 455; s. c., 4 So. Rep. 117.

³ Vigo Tp. v. County of Knox, 111 Ind. 170; s. c., 12 N. E. Rep. 305.

⁴ Means v. Webster, 23 Neb. 432; s. c., 36 N. W. Rep. 809.

⁵ Grayson v. Latham, 84 Ala. 546; s. c., 4 So. Rep. 300.

⁶ Grayson v. Latham, 84 Ala. 546.

duplicate was canceled. It was held that the issue and cancellation of the duplicate was not an admission or recognition of the validity of the original.¹ A publication of an order of a county court, calling in county warrants for redemption, in one newspaper, is not such a compliance with the Arkansas statute requiring such notice to be published in *newspapers* as will render void warrants not presented in obedience to such notice.² There is no presumption, conclusive or otherwise, raised in favor of due publication of an order calling in county warrants for redemption, by a recital in a subsequent order, re-issuing some of the warrants, that "due legal notice of the order calling in had been given as required by law."³ But a county warrant issued after the constitutional limit of indebtedness has been reached by the county, which is general in form, and does not purport to be payable from any particular fund or out of the revenue from the taxes of any specified year, is not a valid assignment.⁴

§ 875. **Actions upon warrants.**—A Dakota statute requires the seal of the county to be attached to every county warrant. This makes such a warrant "a sealed instrument" within the meaning of the statute providing that actions on sealed warrants shall be brought within twenty years.⁵ An

¹ *Royster v. County of Granville*, 98 N. C. 148; s. c., 3 S. E. Rep. 739.

² *Lusk v. Perkins*, 48 Ark. 238; s. c., 3 S. W. Rep. 847.

³ *Lusk v. Perkins*, 48 Ark. 238; s. c., 2 S. W. Rep. 847.

⁴ *People v. May*, 9 Colo. 404; s. c., 12 Pac. Rep. 838.

⁵ *Heffleman v. Pennington County* (So. Dak., 1892), 52 N. W. Rep. 851. See, also, *Dillon on Munic. Corp.* (4th Ed.), § 190; *Port Royal v. Graham*, 84 Pa. St. 426, overruling a plea of the statute of limitations on simple contract; *Benoist v. Inhabitants of Carondelet*, 8 Mo. 250, sustaining a demurrer to the complaint on the ground that it was declared on as a simple contract and not "a sealed instrument;" *Gilman v. School District*, 18 N. H. 215, holding that as-

sumpsit would not lie on this contract for building a school-house, as the sealing constituted the contract a specialty. In *Crudup v. Ramsey*, 54 Ark. 168; s. c., 15 S. W. Rep. 458, the court held the action on a county warrant barred though it was sealed, but placed the decision upon the fact that the seal was not required to county warrants by law, and the mere affixing it by an official could not give it more dignity. They thus intimated that if the seal had been authorized as required it would have impressed the instrument with a different character. In *Goldman v. Conway County*, 10 Fed. Rep. 188, are Judge Caldwell's remarks suggestive in the same direction. So in *Pelton v. Crawford County*, 10 Wis. 63, where the law requires no seal to

ordinary county warrant on the general fund, regularly issued, constitutes a *prima facie* cause of action against the county, and an action will lie directly on it.¹ Where such a warrant is in form payable to bearer, its possession and presentation by plaintiff at the trial is *prima facie* evidence of plaintiff's ownership, even though such ownership is denied in defendant's answer.² It has been held that a warrant issued by city authorities for the amount necessary to redeem the lands from tax sale of certain tax-payers upon their payment of a fixed amount on account of back taxes due the city was valid, as the council could make such a compromise, and that the holder of the certificate of the tax sale from which the land was redeemed was entitled to recover the amount from the auditor who had the warrant in his possession turned over to him by his predecessor,³ and his right of action was not barred by

county warrants. Under a similar law to the one in Dakota, warrants have been held not valid unless the county seal was duly affixed, in *Springer v. Clay County*, 35 Iowa, 241; *Smeltzer v. White*, 92 U. S. 390. See, also, on the same point, *City of Kenosha v. Lamson*, 9 Wall. 477; *City of Lexington v. Butler*, 14 Wall. 282.

¹ *Heffleman v. Pennington County* (So. Dak., 1892), 52 N. W. Rep. 851. The court said:—"The statute is very explicit as to how a claim against a county shall be passed upon by its board of county commissioners. The duty of the board is to judicially investigate the validity and justice of the claim, and to allow or disallow the same in whole or in part, as to such board shall appear just or lawful. While the immediate purpose of the warrant is to enable the claimant to whom it is delivered to draw from the county treasurer the amount of money therein named, yet it rests upon, and its issue and payment could only be justified upon, the theory that after a full investigation the county had found itself to be so indebted; so that the warrant is a

formal and deliberate acknowledgment by the county of such indebtedness." In *Board of Comm'rs v. Day*, 19 Ind. 450, a county warrant regularly issued was said to be "in legal effect the promissory note of the county." See, also, *Mortgage Co. v. City of Mitchell* (So. Dak.), 48 N. W. Rep. 131; *Savage v. Crawford County*, 10 Wis. 49; *Comm'rs v. Keller*, 6 Kan. 510; *Clark v. Polk County*, 19 Iowa, 248, holding that while county warrants were not negotiable under the law merchant, still they might be sued on and an action maintained thereon either by the original payee or his assignee. *Brown v. Town of Jacobs*, 77 Wis. 27; s. c., 45 N. W. Rep. 679; *Terry v. Milwaukee*, 15 Wis. 490; *International Bank v. Franklin County*, 65 Mo. 205; *City of Scranton v. Hyde Park Gas Co.*, 102 Pa. St. 382; *Grayson v. Latham*, 84 Ala. 546; s. c., 4 So. Rep. 200; *People v. Clark County*, 50 Ill. 213.

² *Heffleman v. Pennington County* (So. Dak., 1892), 52 N. W. Rep. 851.

³ *Hintrager v. Richter* (Iowa, 1892), 52 N. W. Rep. 188.

failure to commence an action against some of the defendant's predecessors in office.¹

§ 876. **Mandamus to compel payment of warrant.**—An order of a board of county commissioners requiring that county warrants previously issued shall be presented for re-examination by the board, and providing that all such scrip not presented by a stated day shall be of no effect or “repudiated,” is, though published according to the terms of the order, no defense to *mandamus* to compel the payment of warrants not presented.² The authorities in the note hold that where the claim of the relator is one of a character whose payment the law imposes on the county or municipality, and it has been audited and ordered to be paid by officers having the authority to audit it and order its payment, a county treasurer or other paying officer should not refuse to pay if he has the money with which to pay it unless the claim is for some reason fraudulent. The duty to pay where the paying officer has the funds with which to pay, and the officers auditing and ordering payment have acted within the scope of their powers, and there is no fraud attached to the claim, is merely ministerial, and *mandamus* will lie to compel its payment. The right to this remedy has been doubted but not decided.³ But such right is affirmed in the later New York cases. As to the

¹ *Hintrager v. Richter*, cited in the preceding note, his right of action not accruing against defendant until the latter received the warrant. See, also, *Hintrager v. Richter*, 76 Iowa, 406; s. c., 41 N. W. Rep. 55.

² *Ray v. Wilson* (Fla.), 10 So. Rep. 613. The court said: —“County and city orders issued by the proper officers are *prima facie* binding and legal. Such officers are presumed to have done their duty, and the orders constitute a *prima facie* cause of action, the impeachment of which must come from the defendant.” See, also, *Dillon on Munic. Corp.*, § 502; *Comm’rs v. Day*, 18 Ind. 450; *Comm’rs v. Keller*, 6 Kan. 510; *Clark v. City of Des Moines*, 19 Iowa, 199,

211; *Cheaney v. Town of Brookfield*, 60 Mo. 53; *City of Connersville v. Hydraulic Company*, 86 Ind. 184. As to *mandamus* in such cases, *State v. Mayor &c. of Jacksonville*, 23 Fla. 21; *Commonwealth v. Johnson*, 2 Binney, 275; *Baker v. Johnson*, 41 Me. 15; *Potts v. State*, 75 Ind. 336; *State v. Gandy*, 12 Neb. 232; s. c., 11 N. W. Rep. 296; *Johnson v. Campbell*, 39 Tex. 83; *Hendricks v. Johnson*, 45 Miss. 644; *Clayton v. Williams*, 49 Miss. 311; *State v. Treasurer*, 43 Mo. 228; *People v. Edmonds*, 15 Barb. 529; s. c., 19 Barb. 648; *People v. Haws*, 36 Barb. 59; *People v. Wendell*, 71 N. Y. 171; *People v. Mott*, 64 N. Y. 600.

³ *People v. Lawrence*, 6 Hill, 244.

return made to the *mandamus* in the Florida case, the court held it defective in that it did not state with such precision and certainty that the court might be fully advised of all the particulars necessary to enable it to pass upon the sufficiency of the return.¹ On *mandamus* to a county treasurer to pay plaintiff warrants held by him, where it appears on the return of the alternative writ that defendant had funds sufficient to pay such warrants when presented to him, applicable to their payment, and that the warrants were legal claims against the county, a peremptory writ should issue for payment forthwith.² A Colorado statute provides that county warrants or orders not taken up at the date of presentation shall be paid according to the order of time in which they may be presented to the county treasurer. It has been held that a county treasurer could not divert money, raised for the purpose of funding these warrants, to pay warrants subsequently issued by the county commissioners to meet current expenses, under the statute which provides that the board may draw warrants for such purposes to the extent of eighty per cent. of the incoming revenue for the current year.³ The holder of city warrants, however, is not bound to proceed by *mandamus* against the city treasurer, but may sue the city directly on the warrants.⁴ Where, in proceedings for *mandamus* to compel a county treasurer to pay a plaintiff warrants held by him, duly drawn upon the treasurer, it is ascertained in an issue made upon the return of an alternative writ that the respondent had funds sufficient to pay such warrants at the time they were presented to him applicable to the payment thereof, and that the warrants presented were legal claims against the county, the judgment should direct the issuance of a peremptory writ commanding the respondent to pay the warrants forthwith, and the plaintiff is entitled to his costs.⁵

¹State v. Mayor &c. of Jacksonville, 22 Fla. 21, citing Comm'rs v. Johnson, 21 Fla. 578; High's Extra. Leg. Rem., §§ 470, 472, 474.

²Bush v. Geisey, 16 Oregon, 355; s. c., 19 Pac. Rep. 123.

³People v. Austin, 11 Colo. 134; s. c., 17 Pac. Rep. 485.

⁴Travelers' Ins. Co. v. City of Denver, 11 Colo. 434; s. c., 18 Pac. Rep. 556.

⁵Bush v. Geisey, 16 Oregon, 355; s. c., 19 Pac. Rep. 123.

§ 877. **Defenses to actions on warrants.**—A county commissioners' court passed an order that all warrants not registered under a certain act of the legislature should not be paid. It was held, in an action brought more than four years after such order on a warrant issued before the order, that, in the absence of any knowledge on the part of the plaintiff from any source of the order, the statute of limitations was not set in operation against him.¹ The code of North Carolina provides that "all claims against the several counties, cities and towns of this State, whether by bond or otherwise, shall be presented to the chairman of the board of county commissioners, or to the chief officers of said cities and towns, as the case may be, within two years after the maturity of such claims, or the holders of such claims shall be forever barred from a recovery thereof." The plaintiff purchased a county order issued on January 2, 1877. On October 14, 1879, he presented it for payment to the sheriff and treasurer of the county, and prior to said date he presented it to the sheriff who went out of office in 1877. Plaintiff commenced suit on the order in 1883. It was held that the action was barred by the statute.² A suit was brought on a warrant issued in pursuance of an order of the county commissioners reciting that it was in payment of a balance due certain contractors for building a court-house. The warrant was indorsed in blank by one of the contractors, but he testified that he had no recollection whatever of the warrant, and that his firm had been paid for the court-house from other sources, by the conveyance of land from a judgment debtor of the county. There was other evidence strongly suggestive of fraud in the issuance of the warrant. The plaintiff's theory was that there was a balance coming to the judgment debtor of the county on the conveyance of his land to the contractor, and that the warrant was issued in settlement of that balance. It was held that an instruction to the jury to the effect that, if the contractors had been paid for the court-house outside of the warrant, they should find for the defendant, leaving out of view the theory of plaintiff, was erroneous.³ A plaintiff

¹ *Leach v. County of Wilson*, 68 Tex. 353; s. c., 4 S. W. Rep. 613. *ville Co.*, 98 N. C. 148; s. c., 3 S. E. Rep. 739.

² *Royster v. Commissioners of Gran-* ³ *Leach v. County of Wilson*, 68 Tex. 353; s. c., 4 S. W. Rep. 613.

having proved his warrant, that it had been registered, that the proper time had come for payment according to its place on the register, and that payment had been demanded and refused, or that a demand was unnecessary, the burden was held to be on defendants to overturn the presumption of liability.¹ The fact that a warrant was issued in recognition of a debt contracted in the purchase of provisions during the war for the maintenance of the families of soldiers who were serving, or were disabled, or had lost their lives in the Confederate army, has been held to be a valid defense to an action on the warrant.² Also, that to vacate a warrant issued for the purchase of corn, evidence was not admissible to show that no prior order had been granted authorizing the purchase, as the lack of such order constituted no defense if the county commissioners had allowed the claims and authorized the issue of the warrant.³ It was also held that hearsay testimony as to the purchase of the corn, the use of it, etc., and as to matters pertaining to the validity of the warrant, was inadmissible.⁴ Also, that the fact that a warrant sued on was never authorized by the commissioners might be shown by oral proof where the records had been burned.⁵ A municipal corporation, having issued warrants which on their face bear interest and are payable when certain assessments are collected, cannot escape liability for interest subsequently accruing by showing that it was there ready to pay the warrant.⁶ Where negotiable certificates of indebtedness issued by a city have been sued upon by the payee and declared invalid for want of power to issue negotiable instruments, the payee may maintain an action for money had and received, provided the city had power to make the contract out of which the indebtedness arose; and the fact that the payee was not a party to

¹ Grayson v. Latham, 84 Ala. 546; s. c., 4 So. Rep. 200.

² Grayson v. Latham, 84 Ala. 546.

³ Grayson v. Latham, 84 Ala. 546.

⁴ Grayson v. Latham, 84 Ala. 546.

⁵ Grayson v. Latham, 84 Ala. 546.

Also, that the time and place of purchase of this corn and the persons by whom this contract was made, when and how the delivery was effected,

whether or not the claims were properly audited, and all such matters pertaining to the warrant and the purpose for which it was given, were admissible in evidence.

⁶ Read v. City of Buffalo, 74 N. Y. 463. There is no principle of law which permits a municipal corporation to set up in bar of a debt that they were willing and offered to pay.

that contract is immaterial when the certificates were issued to him at the request of the contractor, and the money was received by the city and paid over to the contractor.¹

§ 878. Notes of counties.—It has been held in New York that a county is not liable on notes issued by its treasurer without authority, though they recite that they were issued in pursuance of a resolution of the board; nor as for money had and received, the proceeds of the notes being placed by the payee to the credit of the treasurer and applied on his indebtedness to the State treasurer on account of taxes.² A county being largely indebted on account of county and town bounties to volunteers, represented by short loans for which annual taxes were levied, the treasurer was authorized to obtain extensions thereof as the towns might desire, by resolutions of the board each year until 1875. The treasurer assumed the authority of borrowing money on notes of the county signed by himself officially, and giving new notes for old notes and bonds. The board being empowered under the New York statute to borrow money and renew its obligations for bounties, which statute also ratified subsisting obligations of that nature, it was held that the treasurer's acts were binding on the county.³ Acts of a county treasurer in procuring extensions of and renewing certain indebtedness in pursuance of resolutions of the board are binding on the county, there being no mistake as to the debt intended, although the resolutions give it the name of a debt which does not exist.⁴ Resolutions of a county board authorizing the treasurer to procure extensions "of such portion of the town bounty debt as the several towns owing the same may desire extended" give no authority to create new debts or allow doubtful or disputed claims, but merely to extend such debt as is represented by notes, bonds and obligations of the county.⁵ Where a treasurer was authorized to renew and extend certain subsisting

¹ Bangor Savings Bank v. City of Stillwater, 49 Fed. Rep. 721.

² First Nat. Bank v. County of Saratoga, 106 N. Y. 488; s. c., 13 N. E. Rep. 439.

³ Parker v. County of Saratoga, 106 N. Y. 392; s. c., 13 N. E. Rep. 308.

⁴ Parker v. County of Saratoga, 106 N. Y. 392.

⁵ Parker v. County of Saratoga, 106 N. Y. 392.

indebtedness as the towns owing the same might desire, and to give new obligations not exceeding the amount of the debt actually extended, it was not a sufficient defense to an action on such new obligations to show that the treasurer had fraudulently given notes largely in excess of the amount requested without proof that the notes in suit represented part of such excess.¹

§ 879. Notes of towns.—Where the notes of a Connecticut town have been issued by its treasurer without legal authority, such an act of a treasurer cannot be ratified at a subsequent town meeting, unless the subject of ratifying it is specified in the notice of the meeting; nor can any acts of the town operate as a ratification, unless done with intent to ratify and with knowledge of all the material facts; nor as an estoppel, unless the plaintiff is shown to have relied upon them.² A town treasurer has no authority to take up notes for money

¹ *Parker v. County of Saratoga*, 106 N. Y. 392.

² *Town of Bloomfield v. Charter Oak Bank*, 121 U. S. 121; s. c., 7 S. Ct. Rep. 865. The object of this notice is that all the inhabitants (whose property will be subject to be taken to satisfy the obligations of the town) may know in advance what business is to be transacted at the meeting. If the subject of the vote is not specified in the notice or warning, the vote has no legal effect and binds neither the town nor the inhabitants. No one can rely upon a vote as giving him any rights against the town without proving a sufficient notice or warning of the meeting at which the vote was passed. The importance of this is from the fact that towns in Connecticut as in the other New England States differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations into which the State is divided by the legislature from time to time at its discretion for political purposes and the con-

venient administration of government. They have those powers only which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of the town are members of the *quasi*-corporation. 1 *Swift's System*, 116, 117; *Granty v. Thurston*, 23 Conn. 416; *Webster v. Harwinton*, 32 Conn. 131. Also in Connecticut as in Massachusetts and Maine, by common law and immemorial usage, the property of any inhabitant may be taken in execution upon a judgment against the town. *Atwater v. Woodbridge*, 6 Conn. 223, 228; *McLoud v. Selby*, 10 Conn. 390; *Beardsley v. Smith*, 16 Conn. 368; 5 *Dane*, Abr. 158; *Chase v. Merrimack Bank*, 19 *Pick.* 564, 569; *Gaskill v. Dudley*, 6 *Met.* 546; *Adams v. Wicasset Bank*, 1 *Greenl. (Me.)* 361; *Fernald v. Lewis*, 6 *Greenl. (Me.)* 264; *Hopkins v. Elmore*, 49 *Vt.* 176. See, also, *Reynolds v. New Salem*, 6 *Met.* 340; *Stoughton School Dist. v. Atherton*, 11 *Met.* 105; *Moor v. Newfield*, 4 *Greenl. (Me.)* 44; ch. XI, *supra*.

loaned to the town by giving a new note therefor; and a vote of the town in the year in which the new note was given, but before its execution, authorizing him "to hire money for the use of the town, when necessary, upon the approval of the selectmen," would not confer such authority in itself.¹ Where a town treasurer of his own authority took up notes for money loaned the town by giving a new note therefor, it was held that the transaction was not within the exceptions of the Massachusetts statute providing that thereafter no debt should be created by any town, except (1) for temporary loans payable out of the taxes for that or the next year; (2) debts incurred upon a two-thirds vote; (3) debts contracted for purposes for which towns may lawfully expend money; and the note created no valid indebtedness against the town.² It is beyond the scope of the authority of a township board, on settlement with the treasurer, to take notes payable at a future day for an amount less than that found due, and the board's acceptance of such notes will not stay the township's right of action on the treasurer's bond.³

§ 880. **Township orders.**— *Mandamus* will not lie to compel payment of township orders, repudiated as outlawed, when respondent board sets up in addition to that ground that it has no knowledge as to the validity or consideration of the orders, or whether relator owns them; that no one but a third person ever appeared before it, or claimed them; and it appears that all the orders but two were more than six years old when payment was demanded and suit brought, and one of the others was never indorsed by the payee.⁴ The defendant in this case, one of the board of selectmen, signed and delivered to the chairman a town order in blank, to be used for a legitimate purpose. The chairman issued it to plaintiff, who loaned and advanced to him the money thereon, relying upon his sole assurance that the town was in need of the money, and that the board was authorized by the town

¹ *Abbott v. Town of North Andover*, 145 Mass. 484; s. c., 14 N. E. Rep. 754.

³ *Otsego Lake Tp. v. Kirsten*, 72 Mich. 1; s. c., 40 N. W. Rep. 26.

⁴ *Avery v. Township Board*, 73

² *Abbott v. Town of North Andover*, 145 Mass. 484. Mich. 622; s. c., 41 N. W. Rep. 818.

to borrow it. Defendant was wholly ignorant of such disposition of the town order, and the false representations made by the chairman. It was held that defendant was not liable in a suit by plaintiff for false warranty.¹ A township order is not negotiable, and the mere blank assignment thereof does not vest in the holder the right to maintain an action in his own name against the township for the amount of the order.² A township order will not bear interest.³ Where a town order is presented by the payee to the treasurer of the town and paid, it ceases to be a valid contract and cannot be again negotiated in payment of other debts owing by the town.⁴

§ 881. The same subject continued.—A delay for more than six years to demand payment of township and highway orders, or to apply for *mandamus* to compel such payment, if unexplained, will bar such relief.⁵ Where orders on a town treasurer are signed by the chairman of the town board and countersigned by the town clerk, and purport on their face to have been issued for demands against the town, it will be presumed that the claims for which they were drawn have been properly audited and allowed, and that the clerk was authorized to issue the orders, and a complaint in an action thereon need not contain these averments.⁶ It has been held that an indorsement on a county order dated more than thirty days before the bringing of a suit and purporting to be signed by the county treasurer, which recites that it was presented for payment and refused for want of funds, has been held sufficient evidence of such presentation to warrant the bringing of a suit thereon.⁷ There being no provision of law authorizing town officers to establish a separate road fund, town orders,

¹ Fuller v. Mower, 81 Me. 380; s. c., 17 Atl. Rep. 312.

² Township of Snyder v. Bovaird, 122 Pa. St. 442; s. c., 15 Atl. Rep. 910, where it was held that where a township order has been assigned, the supervisors have no authority to take it up and issue a new one to the assignee.

³ Township of Snyder v. Bovaird, 122 Pa. St. 442; s. c., 15 Atl. Rep. 910.

⁴ Mitchell v. Inhabitants of Albion, 81 Me. 482; s. c., 17 Atl. Rep. 546.

⁵ Avery v. Tp. Board of Krakon, 73 Mich. 622.

⁶ Brown v. Town of Jacobs, 77 Wis. 27; s. c., 45 N. W. Rep. 679.

⁷ Alexander v. Oneida County, 76 Wis. 56; s. c., 45 N. W. Rep. 21. The Wisconsin statute provides that no action shall be brought upon a county order until thirty days after a demand for payment.

though in terms drawn on the road fund, will be deemed payable out of the general fund; and in an action on the orders a complaint is not demurrable for failure to allege that there is any money in the road fund from which they can be paid.¹ Receiving a township order as the allowance of a part of an account for services rendered for the reasonable value of which the township is liable will not preclude the creditor from suing for the balance of his services, if he does not accept the order in full payment.² Where a town order is presented by the payee to the treasurer of the town and paid, it ceases to be a valid contract and cannot be again negotiated in payment of other debts owing by the town.³ It has been held that immediately upon the passage of an act creating a new county there came into existence the usual county officers in such county, and that the filling of such offices by the appointment of the county commissioners by the governor, and the other county officers by such commissioners under the authority given in the act, was the filling of *de jure* offices, and made all the officers who qualified and acted under such appointment at least *de facto* officers, and therefore warrants issued by the board of county commissioners so appointed were *prima facie* valid and binding upon the county.⁴ A fund set apart under the Alabama code making the claims of jurors and for other certain expenses preferred claims against the county, and requiring the county treasurer to set apart a sufficient fund for their payment, can be used for the payment of the current claims of those classes only, and jurors' certificates for services previously rendered are not entitled to payment out of it.⁵

§ 882. **School board orders.**—A declaration in a suit against the directors of a new school district on orders issued by the directors of a school district which has since been attached to

¹ *Marvin v. Town of Jacobs*, 77 Wis. 31; s. c., 45 N. W. Rep. 679.

² *Wilkinson v. Tp. of Lone Rapids* (1889), 74 Mich. 64. The decision of a township board, unlike that of the board of supervisors, is not final and conclusive upon the claimant or upon the courts.

³ *Mitchell v. Inhabitants of Albion*, 81 Me. 482; s. c., 17 Atl. Rep. 546.

⁴ *Merchants' Nat. Bk. v. McKinney* (So. Dak.), 48 N. W. Rep. 841.

⁵ *Allen v. Watts*, 88 Ala. 497; s. c., 7 So. Rep. 190.

it with no allegation of an apportionment, under the Illinois statute, of the funds, property and liabilities of the former district, has been held fatally defective.¹ Where a town has adopted the township system of school government and constitutes but one school district, it is not necessary, in an action against the district on orders for school purposes drawn by it on the town treasurer and made payable "out of any money in the school fund not otherwise appropriated," to allege in the complaint that there are moneys in the town treasurer's hands, as the statute requires each school district to annually provide by taxation for an amount sufficient to support its schools during the ensuing year.² A warrant issued to a teacher who does not hold a legal certificate of qualification is void under the Dakota statute; and the fact that the school township received the benefit of the teacher's services does not subject the township to liability under the warrant or on a *quantum meruit*.³ Such warrants not being negotiable so as to cut off defenses, an assignee cannot recover thereon as being a *bona fide* purchaser.⁴ An order for the payment of school funds drawn with the concurrence of two only of three trustees of a district, one of whom was interested in it, has been held to be void.⁵

§ 883. **School warrants.**—School warrants issued by a school board under the provisions of the Dakota statute in payment of necessary appendages for a school-house during

¹ *Moll v. School Directors*, 23 Ill. App. 508.

² *Brown v. Town Board of School Directors*, 77 Wis. 27; s. c., 45 N. W. Rep. 678. The order being made payable "out of any moneys in the school fund not otherwise appropriated" is an order on the general school fund in the town treasurer's hands, and not an order on a special fund; and hence the rule that it must be averred that there are moneys in the special fund sufficient to meet orders thereon does not apply.

³ *Goose River Bank v. Willow Lake School Tp.* (No. Dak.), 44 N. W.

Rep. 1002. The statute referred to provides that no teacher shall be employed to teach who does not hold a lawful certificate of qualification. Every warrant issued to a teacher who holds no such certificate is without consideration and void.

⁴ *Goose River Bank v. Willow Lake School Tp.* (No. Dak.), 44 N. W. Rep. 1002.

⁵ *Shakespear v. Smith*, 77 Cal. 638; s. c., 20 Pac. Rep. 294. And such an order not being a negotiable investment in the sense of the law merchant, a third person can acquire no greater rights under it than the original holder had.

the time a school is taught are *prima facie* valid claims against a school district; and, in the absence of evidence to the contrary, it will be presumed that they were lawfully issued, and duly presented and allowed at a regular meeting of the district, if such presentation and allowance was necessary.¹ A warrant issued by a school district, though in the hands of a *bona fide* purchaser, creates no greater liability than the demand it represents, and it is subject to the same defenses.² Though the Mississippi statute "to provide for the payment of the outstanding public school certificates" declared that such teachers' certificates as were not presented pursuant to its provisions should be barred of all benefit under that act, this, it was held, did not relieve the county from the obligation to pay valid certificates which were not presented under the act because they had been mislaid.³ Orders on the treasurer of a school district directing him to pay certain judgments issued under the provision of the code of Iowa, that "when a judgment has been obtained against a school district the board of directors shall pay off and satisfy the same from the proper fund by an order on the treasurer," are not evidences of debt independent of the judgments on which they are based, and payment cannot be enforced without reference to the ownership of the judgments.⁴

¹Edinburg Am. Land & Mtge Co. v. City of Mitchell (So. Dak.), 48 N. W. Rep. 131.

²Capital Bank v. School Dist. (No. Dak.), 48 N. W. Rep. 363.

³Douglas v. Downing (Miss.), 9 So. Rep. 297.

⁴Richards v. Independent School

Dist. (1891), 46 Fed. Rep. 460, sustaining a demurrer to a petition on these orders by an assignee, in which it was not averred that the judgments had been paid or canceled on the ground that it failed to state a cause of action.

CHAPTER XXIII.

BONDS AND COUPONS.

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| <p>§ 884. Implied power to issue bonds.</p> <p>885. The doctrine of the Supreme Court of the United States.</p> <p>886. The same subject continued.</p> <p>887. <i>Brenham v. German-American Bank</i> — The language of the court.</p> <p>888. <i>Brenham v. German-American Bank</i> — The dissenting opinion.</p> <p>889. Implied power to issue negotiable bonds — The general rule.</p> <p>890. The corporation must have a legal existence.</p> <p>891. No right of action on void bonds.</p> <p>892. Constitutional limitations — Public purpose.</p> <p>893. Aid to manufacturing enterprises.</p> <p>894. Internal improvements.</p> <p>895. Municipal aid to railroads — Express legislative authority essential.</p> <p>896. Railway aid bonds — Legislature may authorize.</p> <p>897. The same subject continued — Negotiable bonds.</p> <p>898. Conditions precedent.</p> <p>899. The same subject continued — Assent of tax-payers.</p> <p>900. The same subject continued — Election.</p> <p>901. Conduct of election continued.</p> <p>902. Conditional subscriptions.</p> <p>903. The same subject continued.</p> <p>904. Ratification.</p> <p>905. The same subject continued.</p> | <p>§ 906. Effect of consolidation of companies on authority to subscribe.</p> <p>907. Effect of constitutional prohibitions.</p> <p>908. The same subject continued.</p> <p>909. Effect of recitals — <i>Knox County v. Aspinwall</i>.</p> <p>910. The same subject continued.</p> <p>911. Authority to determine performance of conditions precedent.</p> <p>912. The same subject continued — Illustration.</p> <p>913. The same subject continued — Illustration.</p> <p>914. The same subject continued — Illustration.</p> <p>915. The doctrine of the United States Supreme Court summarized.</p> <p>916. The rule in New York.</p> <p>917. Signature to bonds.</p> <p>918. Sealing.</p> <p>919. Date — Ante-dating.</p> <p>920. To whom payable.</p> <p>921. Place of payment.</p> <p>922. Time of maturity.</p> <p>923. Delivery.</p> <p>924. Quality of municipal bonds as commercial paper.</p> <p>925. Coupons.</p> <p>926. Payment of coupons.</p> <p>927. Interest upon interest.</p> <p>928. Refunding, substituted and renewal bonds.</p> <p>929. The same subject continued.</p> <p>930. Estoppel by matter <i>in pais</i>.</p> <p>931. Estoppel to set up over-issue in violation of statute.</p> |
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- § 932. Over-issue in violation of the constitution — No estoppel by recitals.
 933. The same subject continued — The rule qualified.

- § 934. *Bona fide* holders.
 935. The same subject continued.
 936. Defenses available against *bona fide* holders.
 937. The same subject continued.

§ 884. **Implied power to issue bonds.**— We have seen that the implied power of municipal corporations to borrow money to carry on their ordinary operations is a point upon which the American cases are not harmonious.¹ There is also an irreconcilable conflict among the authorities as to the power to issue bonds or other commercial paper having the privileges and exemptions accorded to that class of commercial securities.² It is admitted that the power to borrow money, whether express or implied, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor, and that such evidences may be in the form of notes, warrants, and perhaps most generally in that of a bond.³ But there is a marked legal distinction between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale in open market a bond, as a commercial security, with immunity in the hands of a *bona fide* holder for value from equitable defenses.⁴

¹ § 778, *supra*.

² It is settled in England that no corporation, whether municipal or private, has the incidental right to make commercial paper. *Regina v. Litchfield*, 4 Q. B. 891, 906; *Bateman v. Mid. Wales R. Co.*, L. R. 1 C. P. 499; *Broughton v. Manchester Water-Works*, 3 Barn. & Ald. 1; *Bramah v. Roberts*, 3 Bing. N. C. 963; *Peruvian &c. R. Co. v. Thames &c. Ins. Co.*, L. R. 2 Ch. 617.

³ *Merrill v. Monticello*, 138 U. S. 673, 687; *Mayor &c. v. Ray*, 19 Wall. 468; *Sheffield v. Address*, 56 Ind. 157; *Board v. Day*, 19 Ind. 450; *Miller v. Board*, 66 Ind. 162; *Hardy v. Merriweather*, 14 Ind. 203; *Mills v. Gleason*, 11 Wis. 470; *State v. Madison*, 7 Wis.

688; *Clark v. Chillicothe*, 7 Ohio, 354; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Moss v. Harpeth Academy*, 7 Heisk. (Tenn.) 283.

⁴ *Merrill v. Monticello*, 138 U. S. 673, 678. The fundamental difference is illustrated by Justice Bradley in delivering the opinion of the Supreme Court of the United States in *Police Jury v. Britton*, 15 Wall. 566, 571, as follows:—"That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness and issue proper vouchers therefor, is not disputed. This is a necessary incident

§ 885. **The doctrine of the Supreme Court of the United States.**—Accordingly it has been held by the Supreme Court of the United States and has become the settled doctrine of that court, in opposition, however to a considerable number of cases in the State courts,¹ that there is no power to make and utter commercial paper of any kind, unless such power is expressly conferred by law, or is clearly implied from some other power expressly given which cannot be fairly exercised without it;² and Judge Dillon pronounces the contention unsound and dangerous “that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto the power to issue commercial securities, that is, paper, which cuts off defenses when it is in the hands of a *bona fide* holder for value acquired before it is due.”³

to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may arise or exist between the parties, and to any modification, abatement or rescission in whole or in part that may be just and proper in consequence of irregularities, or disregard, or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case [bonds issued for the purpose of funding a previous indebtedness]. The bonds and coupons on which a recovery is now sought are commercial instruments payable at a future day and transferable from hand to hand. . . . The power to issue such paper has been the means in several cases which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of *bona fide* holders. . . .

It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justice and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements.”

¹ *Williamsport v. Commonwealth*, 84 Pa. St. 487; *Bank v. Chillicothe*, 7 Ohio, 354; *Mills v. Gleason*, 11 Wis. 470; *State v. Madison*, 7 Wis. 688; *Clark v. Janesville*, 10 Wis. 136; *Clark v. School Dist.*, 3 R. I. 199; *State v. Babcock*, 22 Neb. 614; *State v. Babcock*, 25 Neb. 278.

² *Claiborne County v. Brooks*, 111 U. S. 400, 406; *Hill v. Memphis*, 134 U. S. 198. See, also, *Kelly v. Milan*, 127 U. S. 139; *Young v. Clarendon Township*, 132 U. S. 340, 347; *Bangor Sav. Bank v. City of Stillwater*, 46 Fed. Rep. 899.

³ *Dillon on Munic. Corp.*, §§ 507, 507a; *Hackettstown v. Swackhamer*, 37 N. J. Law, 191; *Newgass v. City of New Orleans*, 42 La. Ann. 163; *Beaman v. Lake County*, 42 Miss. 237; *Parsons v. Monmouth*, 70 Me. 262;

§ 886. **The same subject continued.**—The charter of the city of Brenham, Texas, provided that “the city council shall have the power and authority to borrow, for general purposes, not exceeding \$15,000 on the credit of said city;” also, that the “bonds of the corporation of the city of Brenham shall not be subject to tax under this act.” Under the authority conferred, the city council passed an ordinance entitled “An ordinance to provide for the issue and sale of \$15,000 in coupon bonds of the city to borrow money for general purposes.” Bonds negotiable in form, and to the full amount authorized by the ordinance, were issued, and the coupons held by the plaintiff, the German-American Bank, were from the bonds so issued. The principal contention on the part of the defendant was that it had no authority to issue the bonds, and that they were void for all purposes and in the hands of all persons. The plaintiff recovered judgment in the United States circuit court,¹ but upon a writ of error the Supreme Court held that the bonds were absolutely void.²

§ 887. **Brenham v. German-American Bank**—**The language of the court.**—The opinion of the court in the case cited in the preceding section¹ was delivered by Justice Blatchford, who said:—“That in exercising its power to bor-

Gause v. Clarksville (1879), 5 Dill. 165, where Judge Dillon examines the cases and discusses the question in all its bearings, holding, however, that the authority may be inferred from the grant of special and extraordinary powers.

¹ German-American Bank v. Brenham, 35 Fed. Rep. 185.

² Brenham v. German-American Bank (1892), 144 U. S. 173. The United States Supreme Court will adopt the settled decisions of the highest court of a State which have determined the extent and character of the powers which its political and municipal organizations shall possess. Claiborne County v. Brooks, 111 U. S. 400; Howard v. Francis County, 50 Fed. Rep. 44. See, also, Comanche

County v. Lewis, 133 U. S. 198, 207. It was urged by the plaintiff in Brenham v. German-American Bank, *supra*, that the Supreme Court of Texas had recognized the validity of this very issue of bonds in Dwyer v. Hackworth, 57 Tex. 245; but in that case the court only decided that it could not enjoin the collection of taxes to pay interest on the bonds without making the holders of the bonds parties to the suit. “There was, therefore, no adjudication in that case as to the validity of the bonds,” and the Supreme Court proceeded to determine the case in hand upon general principles and the precedents in its own court.

¹ Brenham v. German-American Bank, 144 U. S. 173.

row not exceeding \$15,000 on its credit for general purposes the city could give to the lender, as a voucher for the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper is quite clear; but that does not cover the right to issue negotiable paper or bonds unimpeachable in the hands of a *bona fide* holder.¹ . . . The confining of the power in the present case to the borrowing of money for general purposes on the credit of the city limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum, semi-annually for at least ten years. It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and under the well settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case.² . . . We cannot regard the provision in the charter of the city that bonds of the corporation of the city 'shall not be subject to the tax under this act' as recognizing the validity of the bonds in question. Whatever that provision may mean, it cannot include bonds unlawfully issued."³

¹ "The power to borrow . . . Brooks, 111 U. S. 400; Concord v. Robinson, 121 U. S. 165; Kelly v. Milan, 127 U. S. 139; Norton v. Dyersburg, 127 U. S. 160; Young v. Clarendon Township, 132 U. S. 340; Hill v. Memphis, 134 U. S. 198; Merrill v. Monticello, 138 U. S. 673, and declares that Rogers v. Burlington, *supra*, and Mitchell v. Burlington, *supra*, are overruled on the point in question by the later cases cited.

² The learned justice then reviews and analyzes the cases on the subject, viz.: Rogers v. Burlington, 3 Wall. 654; Mitchell v. Burlington, 4 Wall. 270; Police Jury v. Britton, 15 Wall. 566; Claiborne County v.

³ "As there was no authority to issue the bonds, even a *bona fide* holder of them cannot have a right to recover upon them or their cou-

§ 888. **Brenham v. German-American Bank**—The dissenting opinion.—Justices Brown, Harlan and Brewer dissented from the conclusion of the majority of the court, the grounds of dissent being stated by Justice Brewer. He reviews the cases cited in the majority opinion, and concludes from a minute examination that in none of those decided since *Rogers v. Burlington*¹ was there any question as to the negotiable securities being issued under an *express* power to borrow money; and that some of them concede that such a power carries with it the authority to give a negotiable paper for money borrowed. The argument *ab inconvenienti* is also directed against the views of the majority:—"There are perhaps few municipal corporations anywhere that have not, under some circumstances and within prescribed limits as to amount, express authority to borrow money for legitimate corporate purposes. While this authority may be abused, it is often vital to the public interests that it be exercised. But if it may not be exercised by giving negotiable notes or bonds as evidence of the indebtedness so created,—which is the mode usually adopted in such cases,—the power to borrow, however urgent the necessity, will be of little practical value. Those who have money to lend will not lend it upon mere vouchers or certificates of indebtedness. The aggregate amount of negotiable notes and bonds executed by municipal corporations for legitimate purposes, under express power to borrow money simply, and now outstanding in every part of the country, must be enormous. A declaration by this court that such notes and bonds are void because of the absence of *express* legislative authority to execute *negotiable* instruments for the money borrowed will, we fear, produce incalculable mischief."²

pons. *Marsh v. Fulton County*, 10 Wall. 676; *East Oakland v. Skinner*, 94 U. S. 255; *Buchanan v. Litchfield*, 102 U. S. 278; *Hays v. Holly Springs*, 114 U. S. 120; *Daviess County v. Dickinson*, 117 U. S. 657; *Hopper v. Covington*, 118 U. S. 148, 151; *Merrill v. Monticello*, 138 U. S. 673, 681, 682."

¹ 8 Wall. 654, where it was held by

a divided court that an express power to borrow money authorized the issue of negotiable instruments. Justice Brewer points out that the minority in that case dissented solely upon the ground that the transaction was not one of borrowing money.

² *Brenham v. German-American Bank*, 144 U. S. 173, 189, 196. "Where a municipal corporation has the

§ 889. **Implied power to issue negotiable bonds—The general rule.**— Judge Dillon says that “*express power to borrow money*, perhaps in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as, for example, subscriptions to aid railways and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability.”¹

§ 890. **The corporation must have a legal existence.**— When the attempted organization of a municipality is void, such a body may plead the invalidity of its organization in defense to a suit brought on its bonds, since it has no power to issue them.² But although the original organization of a

power to bind itself by written obligation without the power to make the same negotiable and it executes its written obligation making the same negotiable in form, it would not be void. It would result only that the instrument would not in fact be negotiable, and would lack the characteristics with which actual negotiability would clothe it.” Adams, J., in *City of Sioux City v. Weare* (1882), 59 Iowa, 95, 100.

¹ 1 Dillon on Munic. Corp., § 127 (on p. 192), quoted and approved in the dissenting opinion by Justice Brewer in *City of Brenham v. German-American Bank*, 144 U. S. 173, 196; *Williamsport v. Commonwealth*, 84 Pa. St. 487; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Commonwealth v. Allegheny County*, 37 Pa. St. 241; *Reinbolt v. Pittsburgh*, 41 Pa. St. 278; *Adams v. Rome*, 59 Ga. 765; *Mayor &c. v. Inman*, 57 Ga. 370; *Galena v. Corwith*, 48 Ill. 423; s. c., 95 Am. Dec. 557; *De Voss v. Richmond*, 18 Gratt, 338; s. c., 98 Am. Dec. 647; *Tucker v. Raleigh*, 75 N. C. 267; *Kelly v. Mayor*, 4 Hill, 265; *Doty v.*

Elsbree, 11 Kan. 209 (see, also, *Comanche County v. Lewis*, 133 U. S. 198); *Mayor &c. v. Lombard*, 51 Miss. 125; *Railroad Co. v. Evansville*, 15 Ind. 395. *Contra*, *City of Brenham v. German-American Bank*, *infra*. As to what does not constitute a *borrowing* of money, see *Gelpecke v. Dubuque*, 1 Wall. 221; *Gould v. Town of Sterling*, 23 N. Y. 458, and dissenting opinion in *Rogers v. Burlington*, 3 Wall. 654, 670. In *Comanche County v. Lewis*, *supra*, bonds given for borrowed money were held valid, under express authority to borrow money; it was decided to be immaterial that they recited the purpose of their issue to be for the erection of county buildings, as they also referred to the act authorizing them and recited that they were issued in pursuance thereof.

² *Ruohs v. Town of Athens* (Tenn., 1891), 18 S. W. Rep. 400. See, also, the important case of *Norton v. Shelby County*, 118 U. S. 425; s. c., 6 S. W. Rep. 1121. But in the case first cited the court said:—“Such a rule would not, of course, apply to

county was confessedly fraudulent, yet where the county had a *de facto* organization, and the records of such organization appeared regular and valid upon their face, and the governor recognized and proclaimed the organization, and its validity was subsequently recognized by the legislature of the State, it was held that bonds in regular form issued while that organization was in existence were valid obligations in the hands of *bona fide* purchasers for value before maturity.¹

§ 891. No right of action on void bonds.— When a municipal corporation sells bonds which are void and receives the money, it may be compelled to restore it in an action for money had and received. So when it is authorized to purchase property for any purpose, or to contract for the erection of public buildings or for any other public work, and it enters into such authorized contract, but pays for the property acquired or work done in negotiable securities, which it has no express or implied power to issue, it may be compelled to pay for that which it has received in a suit brought for that purpose. But suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received, but has in fact not paid for, because the securities issued in pretended payment were void; and if negotiable paper is uttered without authority of law a suit cannot be maintained *thereon* for any purpose.²

irregularly organized corporations, or those which obtained such validity by special grant of the State, or compliance with general laws, as to be merely voidable organizations, and such as the State by direct proceeding could alone dissolve; but where the constitution or the statute provides that acts done or omissions occurring in efforts to organize a municipal corporation shall render the attempt to organize and the charter invalid and of no force whatever, it is not left to the court to disregard this statutory or constitutional prohibition at the instance of a creditor deceived by the appearance of an or-

ganization. First, is there a legal corporation; and second, has it power to issue the bonds proposed to be sold? He must at his peril determine both questions for himself."

¹ Harper County Comm'rs v. Rose, 140 U. S. 71; s. c., 11 S. W. Rep. 710.

² Dodge v. City of Memphis (U. S. Cir. Ct. App., 1892), 51 Fed. Rep. 165; Mayor v. Ray, 19 Wall. 468; Hitchcock v. Galveston, 96 U. S. 350; Little Rock v. Merchants' Nat. Bank, 98 U. S. 308; Wall v. Monroe County, 103 U. S. 78; Hill v. City of Memphis, 134 U. S. 198; Merrill v. Monticello, 138 U. S. 673.

§ 892. **Constitutional limitations — Public purpose.**—As the payment of municipal bonds must ultimately be accomplished by taxation, a valid bond issued for a purpose for which the legislature could not constitutionally authorize the levy of a tax would be a legal solecism. Taxation is a mode of raising money for some public service or some object which concerns the public welfare. "The legislature has no constitutional right to create a public debt, or to levy a tax, or to authorize any municipal corporation to do so in order to raise money for a mere private purpose."¹ Whether the purpose in a given instance is public or private is a judicial question, and the determination of the legislature is not conclusive.² No case attempts to enumerate the objects which the legislature may constitutionally promote at the public expense. The Supreme Court of New Hampshire declared that the rule to be followed cannot be found in any abstract principle of law, but is essentially a conclusion of fact and public policy.³ The legislature of Massachusetts authorized the city of Boston to issue bonds for a large amount, and to lend the proceeds under certain conditions to the owners of land, the buildings upon which were burned in the great fire of 1872, the object being

¹ Black, C. J., in *Sharpless v. Mayor &c.*, 21 Pa. St. 147; s. c., 59 Am. Dec. 759; *Hilbish v. Catherman*, 64 Pa. St. 159; *Parkersburg v. Brown*, 106 U. S. 487; *State v. Wapello County*, 13 Iowa, 405; *Loan Ass'n v. Topeka*, 20 Wall. 655; *Hackett v. Ottawa*, 99 U. S. 86; *State v. Osawkee Township*, 14 Kan. 418; s. c., 19 Am. Rep. 69.

² *In re Townsend*, 39 N. Y. 171. "If the purpose designated by the legislature lies so near the border line as that it may be doubtful on which side it is domiciled, the court may not set their judgment against that of the law-maker." *Folger, J.* in *Weismer v. Douglas*, 64 N. Y. 91; s. c., 21 Am. Rep. 586.

³ *Perry v. Keene*, 56 N. H. 514. See, also, *State v. Tappan T. Clerk*, 29 Wis. 664; *English v. People*, 96 Ill. 566. "In deciding whether in the

given case the object for which the taxes are assessed falls on the one side or the other of this line [between private and public use], they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." *Justice Miller* in *Loan Ass'n v. Topeka*, 20 Wall. 655, 665.

to insure the speedy rebuilding of the district swept by the conflagration. It was held that the act was not within the constitutional power of the legislature, the incidental advantage to the public by the promotion of private interests not being sufficient to justify their aid by taxation.¹

§ 893. Aid to manufacturing enterprises.—The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose, and it is inferred that when the legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference. It is generally held that the legislature has no right to authorize municipalities to levy taxes to be used in aid of manufacturing enterprises conducted by individuals, or private corporations, for purposes of gain, and therefore a law conferring power to issue bonds for such a purpose is of no validity, and the obligations are utterly void.²

¹ *Lowell v. Boston*, 111 Mass. 463; s. c., 15 Am. Rep. 39. The same rule was applied to the same state of facts in *Feldman v. Charleston*, 23 S. C. 57. See, also, *State v. Osawkee Township*, 14 Kan. 418; s. c., 19 Am. Rep. 99; *McConnell v. Hamm*, 16 Kan. 228; *Weismer v. Village of Douglas*, 64 N. Y. 91; *Allen v. Inhabitants of Jay*, 60 Me. 124; *Brewer Brick Co. v. Brewer*, 62 Me. 62; s. c., 16 Am. Rep. 395; *Commercial Nat. Bank v. City of Iola*, 20 Wall. 655; *Bissell v. Kankakee*, 64 Ill. 249; *Coates v. Campbell*, 37 Minn. 498. For illustrations of public purposes, see *Wilkinson v. Cheatham*, 43 Ga. 258; *Curtis v. Whipple*, 24 Wis. 350; *Weeks v. Milwaukee*, 10 Wis. 242; *Jenkins v. Andover*, 103 Mass. 94; *Tyler v. Beecher*, 44 Vt. 648.

² "If it be said that a benefit results to the local public of a town by estab-

lishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally the promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town." Per Justice Miller, in *Loan Ass'n v. Topeka*, 20 Wall. 655, 665; holding also that payment of interest in such cases by the city works no estoppel. For other cases in point, see *Parkersburg v. Brown*, 106 U. S. 487; s. c., 2 Am. & Eng. Corp. Cas. 263; *Blair v. Cumming County*, 111 U. S. 363; *Cole v. La Grange*, 113 U. S. 1; s. c.,

§ 894. **Internal improvements.**—The statutes of some of the States authorize cities and counties to issue bonds in aid of any work of “internal improvement.” A toll-bridge,¹ water-works owned by a city,² and water-power for a public grist-mill,³ have been held to be within the scope of the statute.⁴

§ 895. **Municipal aid to railroads — Express legislative authority essential.**—By an unbroken current of decisions, both in federal and State courts, it is settled law that a municipality has no implied power to contract debts for the purpose of aiding a railway company or subscribing to its stock.⁵

7 Am. & Eng. Corp. Cas. 379; *Valley Iron Works v. Moundsville*, 11 West Va. 1; *McConnell v. Hamm*, 16 Kan. 228; *People v. Parks*, 58 Cal. 624; *Brodhead v. Milwaukee*, 19 Wis. 624; *Osborne v. Adams County*, 106 U. S. 181; s. c., 2 Am. & Eng. Corp. Cas. 284; *In re Eureka Basin & Co.*, 96 N. Y. 42; s. c., 3 Dill. 376. In *Hackett v. Ottawa*, 99 U. S. 86; and *Ottawa v. National Bank*, 105 U. S. 342, the bonds were declared valid because they appeared on their face to have been issued for legitimate and authorized purposes. *Ottawa v. Carey*, 108 U. S. 110. Where the constitution prohibits taxation except for corporate purposes, the issue of negotiable bonds, to be expended by a private corporation in improving water-power within the municipal limits, is unauthorized. *Mather v. Ottawa*, 114 Ill. 659. Or to aid a private corporation carrying on a rolling-mill. *Cole v. La Grange*, 113 U. S. 1. Bonds issued for the purpose of supplying the corporation or its citizens with gas or water are for a legitimate public purpose, whether the source of supply is wholly within or wholly without the corporate limits. *Fellows v. Walker*, 39 Fed. Rep. 651 (natural gas).

¹ *Dodge County Comm'rs v. Chandler*, 96 U. S. 205. And a bridge in a

highway contiguous to a city. *State v. Babcock*, 23 Neb. 179; s. c., 36 N. W. Rep. 474. See, also, *State v. Keith County*, 16 Neb. 508, distinguishing *De Clerq v. Hager*, 12 Neb. 185. Under power to aid, a county may itself construct a bridge. *Union Pac. R. Co. v. Colfax County*, 4 Neb. 450. Public roads. *Wilcox v. Deer Lodge County*, 2 Mont. T. 574.

² *State v. Babcock*, 19 Neb. 230.

³ *Blair v. Cuming County*, 111 U. S. 363; *Traver v. Merrick County*, 14 Neb. 327. *Contra* as to steam grist-mills. *Osborne v. County of Adams*, 106 U. S. 181. *Cf. Getchell v. Benton* (Neb., 1891), 47 N. W. Rep. 468; *Township of Burlington v. Beasley*, 94 U. S. 310.

⁴ But authority to “aid in the construction of any railroad or other work of internal improvement” does not include public buildings. *Dawson County v. McNamar*, 10 Neb. 276; *Lewis v. Sherman County*, 2 McCrary, 464; *Union Pac. R. Co. v. Lincoln County*, 3 Dill. 300. See, also, *Rozier v. St. Francois*, 34 Mo. 395; *Guernsey v. Burlington Township*, 4 Dillon, 372; *Lewis v. Sherman County Comm'rs*, 5 Fed. Rep. 269; *Freemont Bldg. Ass'n v. Sherwin*, 6 Neb. 48.

⁵ *Young v. Clarendon Township*, 132 U. S. 340; *Kelley v. Milan*, 127 U. S. 139; *Norton v. Dyersburg*, 127

And even where there is authority to aid a railroad and incur a debt in extending such aid, it is also settled that the power does not carry with it any authority to execute negotiable bonds, except subject to the restrictions and conditions of the enabling act.¹

§ 896. Railway aid bonds — Legislature may authorize.—

The law is now firmly established, except in Iowa, Michigan and Wisconsin, that in the absence of constitutional restraint the legislature may authorize a municipal corporation to sub-

- U. S. 160; *Concord v. Robinson*, 121 U. S. 165; *Daviess County v. Dickinson*, 117 U. S. 657; *Claiborne County v. Brooks*, 111 U. S. 400; *Lewis v. Shreveport*, 108 U. S. 282; *Weightman v. Clark*, 103 U. S. 256; *Wells v. Supervisors*, 102 U. S. 625; *Town of South Ottawa v. Perkins*, 94 U. S. 260; *Town of Coloma v. Eaves*, 92 U. S. 484; *St. Joseph Township v. Rogers*, 16 Wall. 644; *Kenicott v. Wayne County*, 16 Wall. 453; *Pendleton County v. Amy*, 13 Wall. 297; *Police Jury v. Britton*, 15 Wall. 566; *Marsh v. Fulton County*, 10 Wall. 676; *Thomson v. Lee County*, 8 Wall. 327; *Kelley v. Milan*, 21 Fed. Rep. 842; *Katzenburger v. Aberdeen*, 16 Fed. Rep. 745; *Commercial Bank v. Iola*, 2 Dill. 353; s. c., 20 Wall. 655; *Orleans &c. R. Co. v. Dunn*, 51 Ala. 128; *English v. Chicot County*, 26 Ark. 454; *French v. Teschemaker*, 24 Cal. 518; *McCoy v. Brant*, 53 Cal. 247; *Bridgeport v. Hcusatonic R. Co.*, 15 Conn. 475; *Jones v. Mayor &c.*, 25 Ga. 610; *Gaddis v. Richland County*, 92 Ill. 119; *Pitzman v. Freeburg*, 92 Ill. 111; *Barnes v. Town of Lacon*, 84 Ill. 461; *Lafayette &c. R. Co. v. Geiger*, 34 Ind. 185; *Aurora v. West*, 22 Ind. 88, 508; *Delaware Co. v. McClintock*, 51 Ind. 325; *Williamson v. Keokuk*, 44 Iowa, 88; *Jeffries v. Lawrence*, 42 Iowa, 498; *Atchison v. Butcher*, 8 Kan. 104; *Burnes v. Atchison*, 2 Kan. 454; *Clay v. Nicholas County*, 4 Bush (Ky.), 154; *City &c. of St. Louis v. Alexander*, 23 Mo. 483; *Hawkins County v. Carroll County*, 50 Miss. 735; *Reineman v. Covington &c. R. Co.*, 7 Neb. 310; *Starin v. Town of Genoa*, 23 N. Y. 439; *People v. Mitchell*, 35 N. Y. 551; *Gould v. Stirling*, 23 N. Y. 439; *Duanesburg v. Jenkins*, 40 Barb. 574; *Pennsylvania R. Co. v. Philadelphia*, 47 Pa. St. 189; *Nichol v. Mayor &c.*, 9 Humph. (Tenn.) 252; *Cook v. Manufacturing Co.*, 1 Sneed (Tenn.), 698; *Lamoille Valley R. Co. v. Fairfield*, 51 Vt. 257; *Fisk v. Kenosha*, 26 Wis. 23.
- Power to borrow money to contribute to works of internal improvement will sustain a guaranty of railroad bonds. *Savannah v. Kelly*, 108 U. S. 184.
- ¹*Young v. Clarendon Township*, 132 U. S. 340; *Hill v. Memphis*, 134 U. S. 198; *Wells v. Pontotoc County*, 102 U. S. 625; *Ottawa v. Carey*, 108 U. S. 110; *Mayor &c. v. Gilmore*, 21 Fed. Rep. 870; *Milan v. Tennessee Cent. R. Co.*, 11 Lea (Tenn.), 330; *Campbell County v. Knoxville R. Co.*, 6 Coldw. (Tenn.) 598; *Ogden v. Daviess County*, 102 U. S. 134; *Daviess County v. Dickinson*, 117 U. S. 657. See, also, *Aspinwall v. Daviess County*, 22 How. 364; *People v. Coon*, 25 Cal. 635; *Lafayette v. Cox*, 5 Ind. 38.

scribe to stock in a railway company, or to aid it by a donation, and to issue negotiable bonds in fulfillment of those purposes. "The public has an interest in such a road when it belongs to a corporation—as clearly as they would have if it was free or as if the tolls were payable to the State, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind; and this advantage the public has over and above those of rapidity, comfort, convenience, increase of travel, opening of markets and other means of rewarding labor and promoting wealth."¹

¹ Chief Justice Black in *Sharpless v. Mayor &c. of Philadelphia*, 21 Pa. St. 147, 169; s. c., 59 Am. Dec. 759, the leading case on this subject; *Railroad Co. v. Otoe County*, 16 Wall. 667; *Olcott v. Supervisors*, 16 Wall. 678; *St. Joseph Township v. Rogers*, 16 Wall. 664; *Pine Grove Township v. Talcott*, 19 Wall. 666; *Mitchell v. Burlington*, 4 Wall. 270; *Bell v. Mobile &c. R. Co.* (railroad in another State); *Rogers v. Burlington*, 3 Wall. 654; *Gelpcke v. Dubuque*, 1 Wall. 175; *Loan Asso. v. Topeka*, 20 Wall. 665; *Gibbons v. Railroad Co.*, 36 Ala. 410; *Stein v. Mayor &c.*, 24 Ala. 591; *Ex parte Selma &c. R. Co.*, 45 Ala. 696; *Opdike v. Daniel*, 59 Ala. 211; *Robinson v. Bidwell*, 22 Cal. 379; *Stockton &c. R. Co. v. Stockton*, 41 Cal. 147; *Douglas v. Chatham*, 41 Conn. 211; *Society &c. v. New London*, 29 Conn. 174; *Bridgeport v. Railroad Co.*, 15 Conn. 475; *Powers v. Superior Court*, 23 Ga. 65; *Cotton v. County Comm'rs*, 6 Fla. 610; *Leavenworth County v. Miller*, 7 Kan. 479, where the question is thoroughly discussed; *Butler v. Dunham*, 27 Ill. 474; *Quincy &c. R. Co. v. Morris*, 84 Ill. 410; *Robinson v. Rockford*, 21 Ill. 451; *Shaw v. Dennis*, 5 Gilm. (Ill.) 405; *Petty v. Myers*, 49 Ind. 1; *Mt. Vernon v. Hovey*, 52 Ind. 563; *John v. Cincinnati R. Co.*, 35 Ind. 539; *Slack v. Maysville &c. R. Co.*, 13 B. Mon. (Ky.) 1, 26; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Courtney v. Louisville*, 12 Bush (Ky.), 419; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *State v. County Court*, 44 Mo. 504; *City v. Alexander*, 23 Mo. 483; *St. Joseph &c. R. Co. v. County Court*, 39 Mo. 485; *Police Jury v. Succession of McDonough*, 8 La. Ann. 341; *Augusta Bank v. Augusta*, 49 Me. 507; *Hallenbeck v. Hahn*, 2 Neb. 377; *Perry v. Keene*, 56 N. H. 514; *Cincinnati &c. R. Co. v. Clinton County*, 1 Ohio St. 77; *Loomis v. Spence*, 1 Ohio St. 153; *Griffith v. Crawford County*, 20 Ohio, 609; *Cass v. Dillon*, 2 Ohio St. 607; *Walker v. Cincinnati*, 21 Ohio St. 14; *Ohio v. Comm'rs &c.*, 14 Ohio St. 569; *Hopple v. Brown Township*, 13 Ohio St. 311; *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *Clark v. Rochester*, 24 Barb. 446; *People v. Mitchell*, 35 N. Y. 551; *In re Townsend*, 39 N. Y. 171; *Commonwealth v. Pittsburg*, 41 Pa. St. 278; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *Commonwealth v. Perkins*, 43 Pa. St. 400; *Hill v. Forsyth*, 67 N. C. 368; *Louisville &c. R. Co. v. Davidson County Court*, 1 Sneed (Tenn.), 637; *San Antonio v. Jones*, 28 Tex. 19; *San Antonio v. Lane*, 32 Tex. 405; *Harcourt v. Good*, 39 Tex. 456; *Goddin v. Crump* (1837), 8 Leigh (Va.), 120; *Langhorne v. Robinson*, 20 Gratt. 661; *Copes v. Charleston*, 10 Rich. (S. C.) 491. May authorize donations. Chi-

§ 897. The same subject continued — Negotiable bonds.—

It is well settled that the power to subscribe for stock in a railway corporation does not of itself include the power to issue negotiable bonds in payment of it. All grants of power in such cases are to be construed strictly and not to be extended beyond the terms of the law. Whilst a municipal corporation authorized to subscribe for stock or to incur any other obligation may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such paper in the hands of innocent parties for value cannot be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently.¹

§ 898. Conditions precedent.— Where the constitution or the legislature prescribes certain conditions precedent to the granting of aid to a railway, it is necessary, except where the question of power arises between the municipality and an innocent holder for value of its bonds, that there should be a

cago &c. R. Co. v. Smith, 62 Ill. 268; (see, also, Chicago &c. R. Co. v. Pinckney, 74 Ill. 277); Davidson v. Ramsey County, 18 Minn. 482; Whiting v. Sheboygan &c. R. Co., 25 Wis. 167, holds a subscription valid but not a gift. Phillips v. Albany, 28 Wis. 340. In Iowa, acts authorizing subscriptions are held unconstitutional. Hanson v. Vernon, 27 Iowa, 28; State v. Wapello County, 13 Iowa, 388. Cf. Stewart v. Polk County, 30 Iowa, 1. And in Michigan. People v. Salem, 20 Mich. 452; s. c., 4 Am. Rep. 400 (opinion by Judge Cooley), reversed in Pine Grove Township v. Talcott, 19 Wall. 666, and adhered to in People v. State Treasurer, 23 Mich. 499; People v. State Treasurer, 24 Mich. 468; Thomas v. Port Huron, 27 Mich. 320.

¹ Hill v. Memphis, 134 U. S. 198.

See, also, Claiborne County v. Brooks,

111 U. S. 400, 476; Kelley v. Milan, 127 U. S. 139; Ogden v. Daviess County, 102 U. S. 134; Marsh v. Fulton County, 10 Wall. 676; Wells v. Pontotoc County, 102 U. S. 625; Mayor &c. v. Gilmore, 21 Fed. Rep. 870; Green v. Dyersburg, 2 Flip. (U. S.) 477; Concord v. Robinson, 121 U. S. 165; Ottawa v. Carey, 108 U. S. 110, 123; Campbell County v. Knoxville R. Co., 6 Coldw. (Tenn.) 598. Where a town in pursuance of statutory authority subscribes for stock in a railway company, but without such authority issues negotiable bonds in payment thereof, such bonds are absolutely void, and no suit can be maintained on them on the theory that they are valid as non-negotiable instruments. Dodge v. City of Memphis (U. S. Cir. Ct. App., 1892), 51 Fed. Rep. 165.

compliance with all substantial or material requirements.¹ It is not uncommon for the courts to grant an injunction in favor of a tax-payer restraining the issue of bonds under proceedings alleged to be valid, but which in fact constitute a material departure from the terms of the statute;² or if the bonds have been actually issued they may for the same reason be declared void in the hands of one who holds them with knowledge or under circumstances which deprive him of the privileges of a *bona fide* holder for value.³

§ 899. The same subject continued — Assent of tax-payers.—The power to issue bonds may be conferred upon certain officials as representatives of the corporation;⁴ but

¹ *Portland &c. R. Co. v. Hartford*, 58 Me. 23; *People v. Logan County*, 63 Ill. 384; *Force v. Batavia*, 61 Ill. 99; *Wiley v. Town of Brimfield*, 59 Ill. 306; *People v. Cass County*, 77 Ill. 438; *Williams v. Roberts*, 88 Ill. 11; *Lippincott v. Pana*, 92 Ill. 24; *Gaddis v. Richland County*, 92 Ill. 119; *Gould v. Sterling*, 23 N. Y. 456; *Armstrong County v. Brinton*, 47 Pa. St. 367; *People v. Jackson County*, 92 Ill. 444.

² *McClure v. Oxford Township*, 94 U. S. 429; *Chambers County v. Clews*, 21 Wall. 317; *Cairo &c. R. Co. v. Sparta*, 77 Ill. 505; *Union Pac. R. Co. v. Lincoln County*, 3 Dill. 300; *Union Pac. R. Co. v. Merrick County*, 3 Dill. 359; *Packard v. Jefferson County*, 2 Colo. 338; *State v. Montgomery*, 74 Ala. 226. A township subscribed to the capital stock of a railroad under the provisions of the session laws of Kansas of 1887, chapter 183, section 1, on the condition, *inter alia*, that a depot should be built at a certain place. By mistake this place as set out in the petitions for and notices of election was different from that intended, and from that where the depot was in fact built. When this mistake was discovered it was attempted to hold

another election in which the true route of the road and place for the depot should be set out, relying on the provisions of the last clause of the same section, that a second election should be held "for the same purpose" as the first, under certain circumstances. In the preliminaries for the second election a different amount for the subscription and a different route and time of completion of the road were specified. It was held that the election was not for the same purpose as the first, and the subscription was invalid. *Kansas City &c. R. Co. v. Rich Tp.*, 45 Kan. 275; s. c., 25 Pac. Rep. 595. See, also, *Cook v. City of Beatrice* (Neb.), 48 N. W. Rep. 828; *State v. Babcock*, 21 Neb. 599.

³ *Chester &c. R. Co. v. Caldwell*, 72 N. C. 486; *Belo v. Forsyth County*, 76 N. C. 489. See, also, *Louisville &c. R. Co. v. Davidson County Court*, 1 Sneed (Tenn.), 637; *Winston v. Tennessee &c. R. Co.*, 1 Baxt. (Tenn.) 60.

⁴ *McCallie v. Mayor &c.*, 3 Head (Tenn.), 317. See, also, *Hawkins v. Carroll County*, 50 Miss. 735; *State v. School Dist.*, 10 Neb. 544; *Smith v. Clark County*, 54 Mo. 58; *State v. Green County*, 54 Mo. 540.

more generally the authority is made to depend upon the assent of a certain proportion of the voters or tax-payers signified by a petition to the proper officers or manifested at a general or special election.¹ These provisions are deemed to be mandatory, and the use of the word "may" instead of "shall" does not render compliance with them optional.² Where the bonds are to be issued upon a petition or assent signed by a certain number of voters or tax-payers,³ a sufficient petition goes to the jurisdiction, and if enough signers withdraw their names before it has been acted upon, so that an insufficient number remains, there is no power to act in the premises;⁴ and the authorities themselves may rescind a resolution before the rights of other parties have attached.⁵

¹ A popular vote has no efficacy without legislative sanction. *Hayes v. Holly Springs*, 114 U. S. 120; *Allen v. Louisiana*, 103 U. S. 80. The power to submit the question to vote is not exhausted by a single submission. *Society for Savings v. New London*, 29 Conn. 174. *Contra*, *People v. Waynesville*, 88 Ill. 469.

² *Gulf & c. R. Co. v. Miami County*, 12 Kan. 280; *Lewis v. Bourbon County*, 12 Kan. 186; *Steines v. Franklin County*, 48 Mo. 167; *Leavenworth & c. R. Co. v. Platte County*, 42 Mo. 171; *Portland & c. R. Co. v. Standish*, 65 Me. 63.

³ Consent of "inhabitants" in the statute means legal voters. *Walnut Township v. Wade*, 103 U. S. 683.

⁴ *Noble v. Vincennes*, 42 Ind. 125. In proceedings for injunction by tax-payers, signatures attached on Sunday were held to be void. *De Forth v. Wisconsin & c. R. Co.*, 53 Wis. 320; *s. c.*, 5 Am. & Eng. R. Cas. 28. Where the consent of tax-payers of a certain class is required, the petition must show that its signers belong to that class. *Rich v. Mentz Township*, 134 U. S. 622. But the withdrawal must be made before and not after the

hearing on the petition. *Town of Springfield v. Teutonia Sav. Bank*, 84 N. Y. 403; *People v. Wagner*, 7 Lans. (N. Y.) 467; *People v. Allen*, 52 N. Y. 538; *People v. Devoe*, 2 T. & C. (N. Y.) 142; *People v. Sawyer*, 52 N. Y. 296; *People v. Hatch*, 1 T. & C. (N. Y.) 113; *People v. Henshaw*, 61 Barb. 409. *Cf.* *First Nat. Bank v. Town of Dorset*, 16 Blatchf. 62; *Matter of Tax-payers of Greene*, 38 How. Pr. (N. Y.) 515. Several petitions may be circulated at once and presented at different times. *People v. Hughitt*, 5 Lans. (N. Y.) 89; *First Nat. Bank v. Town of Concord*, 50 Vt. 257. See, also, on sufficiency of petition, cases cited in 22 Am. & Eng. Corp. Cas. 54, note; *Jussen v. Lake County Comm'rs*, 95 Ind. 567.

⁵ *In re Road Case*, 17 Pa. St. 71; *Red v. Augusta*, 25 Ga. 386; *Bigelow v. Hillman*, 37 Me. 52; *State v. Hoyt*, 2 Oregon, 246; *New Orleans v. St. Louis Church*, 11 La. Ann. 244. See, also, §§ 299, 368, *supra*, vol. I. A subscription conditional upon the subscription of another town cannot be rescinded after the latter has subscribed. *Redd v. Henry County*, 31 Gratt. 695.

§ 900. The same subject continued — Election.— Where the power to issue bonds depends upon the result of an election provided for by law, the election must be held in compliance with all material statutory requirements.¹ It must be ordered by the proper officers² upon a sufficient petition,³ and posted in the manner prescribed by law,⁴ and the requisite notice given.⁵ The notice should specify with reasonable certainty the subject-matter to be acted upon.⁶

¹ A subscription without such election is void. *Leavenworth &c. R. Co. v. Platte County Court*, 42 Mo. 171. The municipality may, if it chooses, submit the question to vote when it is not compelled to do so by statute. *Mason v. Shawneetown*, 77 Ill. 533.

² *Jacksonville &c. R. Co. v. Virden*, 104 Ill. 339. *Cf. Sauerhering v. Iron Bridge Co.*, 25 Wis. 447; *Marshall County v. Cook County*, 38 Ill. 44.

³ The petition must not be conditional. *Craig v. Town of Andes*, 93 N. Y. 405. *Contra*, *Bittinger v. Bell*, 65 Ind. 445. But such a defect may be cured by the legislature. *People v. Clark*, 53 Barb. 171. "The undersigned, representing a majority of the taxpayers, petition," etc., is a sufficient statement that the signers are a majority. *Town of Solon v. Williamsburg Sav. Bank*, 35 Hun, 1. See further as to requisites of petition, *Kansas City &c. R. Co. v. Rich Township*, 45 Kan. 275; s. c., 25 Pac. Rep. 595; *People v. Spencer*, 55 N. Y. 1; *People v. Ottawa*, 88 Ill. 202; *People v. Cline*, 63 Ill. 394; *Town of Wellsborough v. New York &c. R. Co.*, 76 N. Y. 182; *People v. Barrett*, 18 Hun, 206; *Slack v. Blackburn*, 64 Iowa, 373; *People*

v. Hurlbert, 46 N. Y. 110; *State v. Blackstone*, 63 Wis. 362; *People v. Knowles*, 47 N. Y. 415; *Matter of Gorham*, 43 How. Pr. (N. Y.) 263; *Orchard v. School Dist.*, 14 Neb. 378. False representations to induce citizens to sign. *Wullenwader v. Duni-gan (Neb.)*, 50 N. W. Rep. 428.

⁴ §§ 353, 355, *supra*, vol. I. Where the statute required thirty days' notice, the issue of bonds was restrained for failure to give the notice, although a majority voted in favor of the subscription. *Harding v. Rockford &c. R. Co.*, 65 Ill. 90.

⁵ *George v. Oxford Township*, 16 Kan. 72. Notice signed by the clerk by order of the board sufficient. *Lawson v. Milwaukee &c. R. Co.*, 30 Wis. 597. See § 354, *supra*, vol. I; *Luzader v. Sargent (Wash.)*, 30 Pac. Rep. 142. Act of Illinois, March 6, 1867, granting a charter to the Cairo & Vincennes Railroad Company, provides that counties through which the railroad shall pass may take stock and issue bonds in payment to the company, provided a majority of the legal voters of the county shall vote for the same at an election to be held under the order and direction of the county court. Act of Illinois, No-

⁶ *Bowen v. Mayor &c.*, 79 Ga. 709; *Belfast &c. R. Co. v. Brooks*, 60 Me. 568; *Chicago R. Co. v. Pinckney*, 74 Ill. 277 (see § 351, *supra*, vol. I); *National Bank v. Town of Grenada*, 41

Fed. Rep. 87. The name of the road should be stated. *State v. Roggen*, 22 Neb. 118. *Contra*, *Marshall v. Silliman*, 61 Ill. 218.

§ 901. **Conduct of election continued.**—To authorize a subscription to stock and an issue of bonds the election must be regularly held and conducted. A vote taken at a stated town meeting when the statute required it to be taken at a special meeting was held to be void.¹ And an entry by county commissioners that a subscription was voted by a certain majority does not preclude proof to the contrary in a proceeding instituted for the purpose of contesting the validity of the election, even where contracts have been made in pursuance of the vote.² Where the statute requires the assent of the majority of "legal voters," "qualified voters," "electors," "qualified electors," etc., as the case may be, the question whether those of the class designated who actually voted, as distinguished from those who are entitled to vote, are intended has been often litigated. The weight of authority is that only those who attend and vote are to be considered; but in some instances it has been held that the legislative intent to the contrary clearly appeared.³

November 6, 1849, provides that such elections shall be called on thirty days' notice. It was held that the act granting the charter did not authorize an election except on the notice required by statute, and where bonds have been issued and the authority of the county to issue them is questioned, it devolves on the holder of the bonds to prove that notice of the election under which they were issued was duly given. *Post v. County of Pulaski*, 47 Fed. Rep. 282.

¹ *Pana v. Lippincott*, 2 Ill. App. 466.

² *Goforth v. Construction Co.*, 96 N. C. 535. *Contra*, *Trimmier v. Bomar*, 20 S. C. 354.

³ See 15 Am. & Eng. Encyc. of Law, 1279; § 387, *supra*, vol. I; *Smith v. Proctor*, 130 N. Y. 319; s. c., 29 N. E. Rep. 312; *Metcalf v. City of Seattle* (Wash.), 25 Pac. Rep. 1010; *State v. Snodgrass* (Wash.), 25 Pac. Rep. 1014. The Georgia constitution provides that no bonded indebtedness for the

establishment of certain public improvements shall be incurred by any municipal corporation without the assent of two-thirds of the qualified voters thereof at an election for that purpose. It was held that a provision of the legislature (Code Ga., § 508), that in estimating whether or not two-thirds of the voters have voted in favor of such an indebtedness the judges of election shall base their calculation on the votes cast at the last previous election, is constitutional. Where it appeared under this provision that more than two-thirds as many votes as were cast at the last previous election and more than two-thirds of the votes cast at the election upon the question were in favor of bonding a municipal corporation, the bonds were properly authorized. *Bell v. City of Americus*, 79 Ga. 152; s. c., 3 S. E. Rep. 612; *Boyt v. Dougherty Co.*, 79 Ga. 211; s. c., 3 S. E. Rep. 613.

§ 902. **Conditional subscriptions.**—The authority to subscribe to railroad stock involves the authority to make the subscription conditional.¹ A condition may be that the bonds shall not be sold below par.² It is a common condition precedent that the railroad shall be constructed within a certain time,³ or over a certain route, or that its termini shall be established at certain points. These conditions are strictly construed.⁴ A holder of bonds who took them knowing that conditions had not been complied with by the railroad company in whose favor they were issued is not a *bona fide*

¹ *Jacks v. Helena*, 41 Ark. 213; *People v. Hutton*, 18 Hun, 116; *Falconer v. Buffalo &c. R. Co.*, 69 N. Y. 491; *Packard v. Jefferson County*, 2 Colo. 338; *Townsend v. Lamb*, 14 Neb. 324; *California &c. R. Co. v. Butte County*, 18 Cal. 671; *Coe v. California &c. R. Co.*, 27 Minn. 197; *Rich v. Town of Mentz*, 19 Fed. Rep. 725; *Hodman v. Chicago &c. R. Co.*, 20 Minn. 48; *Cowdrey v. Town of Canada*, 16 Fed. Rep. 532; *Portland &c. R. Co. v. Hartford*, 58 Me. 23; *German Sav. Bank v. Franklin County*, 128 U. S. 526; *People v. Dutcher*, 56 Ill. 144; *Cooper v. Sullivan County*, 65 Mo. 542; *People v. Holden*, 91 Ill. 446; *Alley v. Adams County*, 76 Ill. 101; *Commonwealth v. Turnpike Co.*, 10 Bush (Ky.), 254.

² *Newark v. Elliott*, 5 Ohio St. 114; *Commonwealth v. Alleghany County*, 32 Pa. St. 218; *Omaha Nat. Bank v. Omaha*, 15 Nev. 333.

³ *Cooper v. Sullivan County*, 65 Mo. 542. Receipt of benefits by the municipality may preclude it from availing itself of a breach of the condition. *Kansas City &c. R. Co. v. Alderman*, 47 Mo. 349.

⁴ Constructing a road within two thousand feet of a mill does not fulfill a condition to construct it within twelve hundred feet. *Virginia &c. R. Co. v. Lyon County*, 6 Nev. 68; *Aurora v. West*, 22 Ind.

88; *Portage Co. v. Wisconsin R. &c. Co.*, 121 Mass. 460; *Parker v. Smith*, 3 Ill. App. 356; *Stockton &c. R. Co. v. Stockton*, 51 Cal. 328. *Cf. Johnson County v. Thayer*, 94 U. S. 631. Many of the persons who signed a petition for the calling of an election to vote for the issue of bonds by the township in aid of a railroad, as authorized by the laws of Nebraska, were induced thereto by representations on behalf of the railroad that it would locate a depot on section 16. After it was voted that the bonds should be issued, the depot was located on section 17. It was held that the aggrieved petitioners were entitled to have the issue of the bonds enjoined on account of the false representations. *Wullenwahr v. Dunigan* (Neb.), 47 N. W. Rep. 420. A city voted to issue bonds in aid of a railroad provided the terminus, general offices and headquarters should be there located. It was held that the location of the operating headquarters of the road must be there established before the city would be compelled by *mandamus* to issue the bonds. *State v. Minneapolis*, 32 Minn. 501. See, also, *Portland &c. R. Co. v. Hartford*, 58 Me. 23; *Atchison &c. R. Co. v. Phillips Co.*, 25 Kan. 261; *Purdy v. Lansing*, 128 U. S. 557; *People v. Morgan*, 55 N. Y. 587.

holder, and the fact of non-compliance with the conditions may be set up by the municipality in his suit against it.¹

§ 903. The same subject continued.—A township subscribed certain warrants in aid of a railroad which were to be issued when the company should have built and put in operation, “with cars running thereon by lease or otherwise, its said railroad from the city of A.,” at or near the depot of the F. R. Co., to the city of M. The railroad company built its road from M. to within one hundred and eleven feet of the city limits of A., at which point it intersected the road of the F. R. Co., and, by running its cars over the F. R. Co.’s road to its depot from this intersection, it continuously operated the road from M. to A. This was held to be a substantial compliance with the conditions of the subscription, and *mandamus* to compel the issue of the warrants was denied.² A condition in the vote of bonds that the railroad company should establish and maintain a division terminus at a point situated between two named cities was satisfied where the terminus was established at a point on the line of the road between the two cities a few rods off from a direct line between them.³

§ 904. Ratification.—Bonds which are invalid because of irregularities attending their issue may be ratified by the municipality if it originally possessed the power to issue them.⁴

¹ Mobile Sav. Bank v. Oktibbeha County, 24 Fed. Rep. 110.

² Chicago &c. R. Co. v. Makepeace, 44 Kan. 676; s. c., 24 Pac. Rep. 1104.

³ Chicago &c. R. Co. v. Harris (Kan.), 30 Pac. Rep. 456. See, also, Hodgman v. St. Paul &c. R. Co., 20 Minn. 48; 15 Am. & Eng. Encyc. of Law, 1284 *et seq.* A popular vote authorized the issue to a certain amount for each mile of the road constructed. The proposition voted on specified the termini of the proposed road, and bonds were issued within the limit, but the road was not built between the termini but only for a part of the distance. It was held by a divided court that the bonds were valid.

Nevada Bank v. Steinmitz, 64 Cal. 301. As to waiver or modification of conditions by the municipality, see State v. Daviess County Court, 64 Mo. 30; State v. Montgomery, 74 Ala. 226; Douglas County v. Walbridge, 38 Wis. 179; People v. Waynesville, 88 Ill. 469; Richeson v. People, 115 Ill. 450; Coleman v. Marvin County, 50 Cal. 493; Town of Eagle v. Kohn, 84 Ill. 292; Randolph County v. Post, 93 U. S. 502; Converse v. Fort Scott, 92 U. S. 503; Barnard v. Campbell, 55 N. Y. 456; Chiniquy v. People, 78 Ill. 570; Melvin v. Lisenby, 72 Ill. 63.

⁴ Marshall County v. Schenck, 5 Wall. 772; Barrett v. Schuyler County Court, 44 Mo. 197; Freeport v. Marks,

But where legislative authority was wanting in the first instance, they cannot be made binding by mere municipal ratification, because there is no more power to ratify than there was to create originally.¹ In such a case, however, it is competent for the legislature to validate the bonds by a statute passed subsequent to the issue.² Municipal bonds not originally authorized but subsequently ratified by the legislature will be held valid in the federal courts on the well-settled doctrine of the United States Supreme Court as to the power of a State legislature, in the absence of any constitutional provision to the contrary, to ratify acts of a municipal corporation which it might originally have authorized, notwithstanding decisions of the State Supreme Court adverse to such doctrine, rendered after the issue of the bonds and the passage of the curative act.³

59 Pa. St. 253; 1 Dillon on Munic. Corp. (4th ed.), § 463; Campbell v. Kenosha, 5 Wall. 194. For ratification by levy of tax and payment of interest, see Burr v. Chariton County, 2 McCrary, 604; Mills v. Gleason, 11 Wis. 470; Brown v. Bon Homme County (Dak.), 46 N. W. Rep. 173. That mere silence will not create a ratification, see Otis v. Stockton, 76 Me. 506.

¹ Katzenberger v. City of Aberdeen, 121 U. S. 172; Pana v. Lippincott, 2 Ill. App. 466; Atchison v. Butcher, 3 Kan. 104; Howe v. Keeler, 27 Conn. 538; Bleu v. Bean River &c. R. Co., 20 Cal. 602; People v. Flagg, 17 N. Y. 584; District Township of Doon v. Cummins (U. S., 1892), 12 S. W. Rep. 220, 223.

² Grenada County v. Brogden, 112 U. S. 261; Deyo v. Otoe County, 37 Fed. Rep. 246; Bolles v. Brimfield, 120 U. S. 759; Otoe County v. Baldwin, 111 U. S. 1; Town of Elmwood v. Marcy, 92 U. S. 289; Quincy v. Cook, 107 U. S. 549; Read v. Platts-mouth, 107 U. S. 568; Jonesboro v. Cairo &c. R. Co., 110 U. S. 192; County of Jasper v. Ballou, 103 U. S.

745; Shaw v. Norfolk R. Co., 5 Gray, 180; Black v. Cohen, 52 Ga. 621; Winn v. Macon, 21 Ga. 275; Bass v. Columbus, 30 Ga. 845; Frederick v. Augusta, 5 Ga. 561; Wilson v. Hardesty, 1 Md. Ch. 56; Knapp v. Grant, 27 Wis. 147; Kimball v. Rosendale, 42 Wis. 407; Copes v. Charleston, 10 Rich. (S. C.) Law, 491; New Orleans v. Poutz, 14 La. Ann. 866; Duanesburgh v. Jenkins, 57 N. Y. 177; Municipality v. Orleans Theater Co., 2 Rob. (La.) 209; Bradley v. Franklin County, 65 Mo. 638; Lewis v. Shreveport, 3 Woods (C. C.), 205; Williams v. Roberts, 88 Ill. 11; Gardner v. Haney, 86 Ind. 17; Satterlee v. Matthewson, 2 Peters, 380; Comer v. Folsom, 13 Minn. 219; Kunkle v. Town of Franklin, 13 Minn. 127; Bridgeport v. Housatonic R. Co., 15 Conn. 475; Wilkinson v. Leland, 2 Peters, 627; Atchison &c. R. Co. v. Jefferson County, 17 Kan. 29; First Nat. Bank v. Yankton County, 101 U. S. 129; Keithsburg v. Frick, 34 Ill. 405.

³ Dows v. Town of Elmwood, 34 Fed. Rep. 114; following Bolles v. Town of Brimfield, 120 U. S. 759.

§ 905. **The same subject continued.**—But curative acts will not be extended by a latitudinarian construction so as to cover cases that are not clearly within the legislative intent.¹ Thus, an act legalizing all subscriptions not made in violation of the constitution of the State was held not to validate bonds issued in pursuance of a vote but without legislative authority.² And the statute is not operative if at the time it is enacted the legislature has no power under the constitution to authorize the issue of the bonds,³ or to enable the corporation to issue them in the manner attempted.⁴

§ 906. **Effect of consolidation of companies on authority to subscribe.**—It was held by the Supreme Court of the United States in *Marsh v. Fulton County*⁵ that where the people of a county voted in favor of a subscription for stock in a railroad an act of the legislature passed before the subscription was actually made, making fundamental changes in the organization of the company, and dividing it substantially into three companies, worked in law a revocation of the authority of the county officers to make the subscription. But there was in that case nothing in the general law of the State, and nothing in the charter, which authorized the company to change its organization. In *Nugent v. The Supervisors of Putnam County*,⁶ the principle was asserted that a contract for subscription is precluded or discharged by a subsequent alteration of the organization or purposes of the company, only when such alteration is both fundamental and not provided for or contemplated by either the charter itself or the general laws of the State.⁷ In *Harshman v. Bates*

¹ 1 Dillon on Munic. Corp. (2d ed.), § 544; *Hayes v. Holly Springs*, 114 U. S. 120.

² *Hayes v. Holly Springs*, 114 U. S. 120.

³ *Sykes v. Columbus*, 55 Miss. 115; *Hardenberg v. Van Keuren*, 4 Abb. N. C. 43; *Single v. Marathon County*, 38 Mo. 364.

⁴ *Katzenberger v. Aberdeen*, 121 U. S. 172.

⁵ 10 Wall. 676.

⁶ 19 Wall. 241.

⁷ See, also, *Sparrow v. Evansville &c. R. Co.* 7 Porter (Ind.), 369; *Bish v. Johnson*, 21 Ind. 299; *Hannah v. Cincinnati*, 20 Ind. 30; *Bishop v. Brainard*, 28 Conn. 289; *Schenectady &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Buffalo &c. R. Co. v. Dudley*, 14 N. Y. 336; *Meadow Dam v. Gray*, 30-Me. 547; *Agricultural Branch R. Co. v. Winchester*, 13 Allen, 32; *Noyes v. Spaulding*, 27 Vt. 420; *Pacific R. Co. v. Renshaw*, 18 Mo. 210; *Fry v. Lexington*, 2 Met. 314; *Illinois*

County,¹ before the authority to subscribe conferred by vote upon the county court had been executed by it, the company consolidated with another under a general law, and it was held that the power of the county court was thereby extinguished.² In *County of Scotland v. Thomas*³ the county court, under direct legislative authority to subscribe to the stock of a certain company, subscribed to a company subsequently formed by consolidation (authorized by the act), and the subscription was sustained.⁴ The doctrine declared in the Putnam county case has been frequently affirmed⁵ and the rigid rule laid down in *Harshman v. Bates County*⁶ very much weakened, if not denied.⁷

§ 907. Effect of constitutional prohibitions.—Constitutional provisions prohibiting the legislature from authorizing loans or subscriptions for stock are prospective, not retroactive; they act as a limitation on future legislation only, and do not operate to repeal enabling acts or grants of power in charters then existing. Although put into execution by making the subscription or issuing the bonds after the adoption of the constitution the power remains valid.⁸

River R. Co. v. Beers, 27 Ill. 189; *Terre Haute &c. R. Co. v. Earp*, 21 Ill. 292.

¹ 93 U. S. 569.

² The decision was based upon the principles governing the law of principal and agent, but Judge Dillon points out that it is reconcilable with *Nugent v. The Supervisors of Putnam County*, 19 Wall. 241, on the ground that in the latter case the consolidation was effected *after*, whereas in the former it was *before*, the subscription. 1 Dillon on Munic. Corp. (4th ed.), § 541.

³ 94 U. S. 682.

⁴ *Harshman v. Bates County*, 92 U. S. 569, was distinguished on the ground that there the county court was the mere agent of the township [by a vote of the electors], while in this case the county court acted as the representative authority of the county it-

self [no vote of the electors being required by the act.]

⁵ *New Buffalo v. Iron Co.*, 105 U. S. 73; *Town of East Lincoln v. Dav-enport*, 94 U. S. 801; *Wilson v. Salamanca*, 99 U. S. 504; *Empire v. Darlington*, 101 U. S. 87; *Menasha v. Hazard*, 102 U. S. 81; *Harter v. Kernochan*, 103 U. S. 562; *County of Tipton v. Locomotive Works*, 103 U. S. 523.

⁶ 92 U. S. 569.

⁷ *Livingston County v. Portsmouth Bank*, 128 U. S. 102.

⁸ *Scotland County v. Hill*, 132 U. S. 107; *County of Callaway v. Foster*, 93 U. S. 567; *Henry County v. Nicolay*, 95 U. S. 619; *Schuyler County v. Thomas*, 98 U. S. 169; *Cass County v. Gillett*, 100 U. S. 585; *Ralls County v. Douglass*, 105 U. S. 728; *Louisiana v. Taylor*, 105 U. S. 454; *Calhoun County v. Galbraith*, 99 U. S. 214:

§ 908. **The same subject continued.**—But there is a distinction between the operation of a constitutional limitation upon the power of the legislature and of a constitutional inhibition upon the municipality itself. In the latter case past legislative action is annulled.¹ And if the inhibition be qualified by conditions, it is nevertheless deemed to be self-executing and operating directly upon the municipality, and not in itself enabling the latter to proceed in accordance with the prescribed limitation, and further legislation is necessary before the municipality can act.²

Macon County v. Shores, 97 U. S. 272; Randolph County v. Post, 93 U. S. 502; Ray County v. Vansycle, 96 U. S. 675; Fairfield v. Gallatin County, 100 U. S. 47; Moultrie County v. Fairfield, 105 U. S. 370; Red Rock v. Henry, 106 U. S. 596; Town of Louisville v. Portsmouth Sav. Bank, 104 U. S. 469; Thompson v. Kelly, 2 Ohio St. 647; Fosdick v. Perrysburg, 14 Ohio St. 472; Cass v. Dillon, 2 Ohio St. 607. This doctrine was announced by the Supreme Court of Missouri in State v. Macon County Court, 41 Mo. 453; Kansas City &c. R. Co. v. Alderman, 47 Mo. 349; Smith v. Clark County, 54 Mo. 58, 70, and State v. Sullivan County Court, 51 Mo. 522; but a contrary rule was afterwards adopted in State v. Garrouette, 67 Mo. 445; State v. Dallas County Court, 72 Mo. 329; but the Supreme Court of the United States, having followed the original ruling of the State court in cases arising in Missouri, declined (in Ralls County v. Douglass, *supra*, and Scotland County v. Hill, *supra*) to reconsider its former decisions to the prejudice of *bona fide* holders of bonds issued prior to the change of decisions in the State courts.

¹ A provision in the new constitution keeping in force all laws not inconsistent therewith does not perpetuate any previous law, enabling a municipality to do that which it is

subsequently forbidden to do by the constitution. Norton v. Brownsville, 129 U. S. 479, 490.

² Norton v. Brownsville, 129 U. S. 479. Thus, a provision in the Indiana constitution for bidding subscriptions unless the stock were paid for when subscribed applied to a subscription subsequently made under authority of a prior act containing no limitation. Aspinwall v. Comm'rs, 22 How. 364. See, also, Wadsworth v. Eau Claire County, 102 U. S. 534; Town of Concord v. Portsmouth Sav. Bank, 92 U. S. 625 (constitution of Illinois); Falconer v. Buffalo &c. R. Co., 69 N. Y. 491; Buffalo &c. R. Co. v. Falconer, 103 U. S. 821 (constitution of New York); Jarrolt v. Moberly, 103 U. S. 580; Kelley v. Milan, 127 U. S. 139; Pulaski v. Gilmore, 21 Fed. Rep. 870; Milan v. Tennessee Cent. R. Co., 11 Lea (Tenn.), 330. But the constitutional prohibition cannot affect a contract of subscription already completed. Cass County v. Gillett, 100 U. S. 585; Gunn v. Barry, 15 Wall. 610, 623; United States v. Jefferson County, 1 McCrary, 356. Or a donation previously contracted. Fairfield v. Gallatin County, 100 U. S. 47, overruling Town of Concord v. Portsmouth Sav. Bank, 92 U. S. 625; Chicago &c. R. Co. v. Pinckney, 74 Ill. 277. But the donation must have been made at a valid election. Lippincott v. Pana, 92 Ill.

§ 909. Effect of recitals — Knox County v. Aspinwall.—

The case of *Knox County v. Aspinwall*¹ is one of the earliest and most important decisions of the Supreme Court of the United States in municipal-bond litigation. A statute authorized county commissioners "to take stock in the railroad, payable in county bonds, such as had been issued, provided a majority of the qualified voters of said county, at a designated election, shall vote for the same." The notices of the election provided for by statute were not given. The following recital appeared on the bond:—"This bond is issued in part payment of a subscription of \$200,000 by the said Knox county to the capital stock, etc., by order of the board of commissioners, in pursuance of the third section of the act, etc., passed by the General Assembly of the State of Indiana and approved January 15, 1889." In a suit by a *bona fide* holder without notice, the county was held to be estopped, as against a *bona fide* holder for value, to deny the validity of the bonds on the ground of the irregularity of the election. "The right of the board to act in execution of the authority," said the court, "is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. The board was one, from its organization and general duties, fit and competent to be the depositary of the trust thus confided to it. The

24. The contract to subscribe will be protected though the bonds are not issued until afterwards. *Clay County v. Society of Savings*, 104 U. S. 579; s. c., 5 Am. & Eng. R. Cas. 170; *People v. Hamil*, 134 Ill. 666; s. c., 22 Am. & Eng. Corp. Cas. 39; *Town of Middleport v. Aetna L. Ins. Co.*, 82 Ill. 562; *Moultrie County v. Fairfield*, 105 U. S. 370. As to when the contract is deemed to be complete, see *Falconer v. Buffalo &c. R. Co.*, 69 N. Y. 491; *Jeffries v. Lawrence*, 42 Iowa, 498; *Nugent v. Supervisors*, 19 Wall. 241; *Western Sav-*

ing Fund Society v. City of Philadelphia, 31 Pa. St. 175; *Sacramento v. Kirk*, 7 Cal. 419; *Logansport v. Blake-more*, 17 Ind. 318; *Shelby County Court v. Cumberland &c. R. Co.*, 8 Bush (Ky.), 209; *Chicago &c. R. Co. v. Osage County*, 33 Kan. 597; *Board of Comm'rs v. State*, 115 Ind. 64. A vote without a subscription or agreement is not a complete obligation. *Union Pac. R. Co. v. Davis County*, 6 Kan. 256; *Bound v. Wisconsin R. Co.*, 45 Wis. 543; *Aspinwall v. Comm'rs*, 22 How. 364.

¹ 21 How. 539.

persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests. . . . We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power and before the rights and interests of third parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late even in a direct proceeding to call it into question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way."

§ 910. **The same subject.**—The doctrine laid down in *Knox County v. Aspinwall*¹ was restated by Mr. Justice Strong in a later case as follows:—"Where legislative authority has been given to a municipality or to its officers to subscribe for the stock of a railroad company and to issue bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal."²

¹ Cited in the preceding section.

² *Town of Coloma v. Eaves*, 92 U. S. 484, citing *Bissell v. Jeffersonville*, 24 How. 287; *Van Hastrup v. Madison City*, 1 Wall. 291; *Mercer County v. Hackett*, 1 Wall. 83; *St. Joseph Township v. Rogers*, 16 Wall. 644, and distinguishing *Marsh v. Fulton County*, 10 Wall. 676. See, also, for other cases illustrating this doctrine, *Oregon v. Jennings*, 119 U. S. 74; *Anderson County v. Beal*, 113 U. S. 227; *Dixon County v. Field*, 111 U. S. 83; *Northern Bank of Toledo v. Porter Township*, 110 U. S. 608; *Ottawa*

v. Portsmouth Nat. Bank, 105 U. S. 342; *Lincoln v. Cambria Iron Co.*, 103 U. S. 512; *Buchanan v. Litchfield*, 102 U. S. 278; *Menasha v. Hazard*, 102 U. S. 81; *Foote v. Pike County*, 101 U. S. 688; *Anthony v. Jasper County*, 101 U. S. 693; *Roberts v. Bolles*, 101 U. S. 119; *Douglass v. Pike County*, 101 U. S. 677; *Pompton v. Cooper Union*, 101 U. S. 196; *Darlington v. Jackson County*, 101 U. S. 688; *Lyons v. Munson*, 99 U. S. 684; *Hackett v. Ottawa*, 99 U. S. 86; *Weyauwega v. Ayling*, 99 U. S. 112; *Wilson v. Salamanca*, 99 U. S. 499;

§ 911. Authority to determine performance of conditions precedent.— In *Bernards Township v. Morrison*,¹ special commissioners were authorized to borrow money on the credit of a township and issue bonds therefor upon the written consent of a majority of tax-payers indorsed by the affidavit of the assessors, etc. The bonds actually issued were not in excess of the amount authorized by the statute. A paper purporting to contain the consent of the requisite number of tax-payers was regularly filed, the bonds recited that they were issued in pursuance of the act, and the plaintiff was a *bona fide* holder. It was contended that the consent roll did not in fact contain the requisite number of tax-payers and that the affidavit of

Calhoun County v. Galbraith, 99 U. S. 214; *Nauvoo v. Ritter*, 97 U. S. 389; *Macon County v. Shores*, 97 U. S. 272; *Warren County v. Marcy*, 97 U. S. 96; *Daviess County v. Huidekoper*, 98 U. S. 98; *Schuyler County v. Thomas*, 98 U. S. 169; *San Antonio v. Barnes*, 96 U. S. 316; *San Antonio v. Mehaffy*, 96 U. S. 312; *Cass County v. Johnston*, 95 U. S. 360; *Scotland County v. Thomas*, 94 U. S. 682; *Johnson County v. January*, 94 U. S. 202; *Leavenworth County v. Barnes*, 94 U. S. 70; *Douglass County Comm'rs v. Bolles*, 94 U. S. 104; *Johnson County Comm'rs v. Thayer*, 94 U. S. 631; *East Lincoln v. Davenport*, 94 U. S. 801; *Callaway County v. Foster*, 93 U. S. 567; *Randolph County v. Post*, 93 U. S. 502; *Humboldt Township v. Long*, 92 U. S. 642; *Venice v. Murdock*, 92 U. S. 494; *Town of Elmwood v. Marcy*, 92 U. S. 289; *Moultrie v. Rockingham &c. Sav. Bank*, 92 U. S. 631; *Marcy v. Oswego Township*, 92 U. S. 637; *Pendleton County v. Amy*, 18 Wall. 297; *Kenicott v. Jefferson County*, 16 Wall. 452; *Lynde v. Winnebago County*, 16 Wall. 6; *Grand Chute v. Winegar*, 15 Wall. 371; *Lexington v. Butler*, 14 Wall. 284; *Marshall County Sup. v. Schenck*, 5 Wall. 772; *Cincinnati v. Morgan*, 3 Wall. 275; *Rogers v. Burlington*, 3 Wall. 654; *Meyer v. Muscatine*, 1 Wall. 384; *Gelpcke v. Dubuque*, 1 Wall. 175; *Moran v. Miami County*, 2 Black. 722; *Woods v. Lawrence County*, 1 Black. 386; *Mygatt v. Green Bay*, 1 Biss. (C. C.) 292; *Nicolay v. St. Clair County*, 3 Dill. (C. C.) 163; *Huidekoper v. Buchanan County*, 3 Dill. 175; *Phelps v. Lewiston*, 15 Blatchf. 131; *Third Nat. Bank &c. v. Seneca Falls*, 15 Fed. Rep. 783; *Hopper v. Covington*, 8 Fed. Rep. 777; *Cary v. Ottawa*, 8 Fed. Rep. 199; *Carrier v. Shawanguik*, 10 Fed. Rep. 220; *Irwin v. Town of Ontario*, 3 Fed. Rep. 49; *St. Louis v. Shields*, 62 Mo. 247; *Catron v. La Fayette County (Mo., 1891)*, 17 S. W. Rep. 577; *Smith v. Clark County*, 54 Mo. 58; *Steines v. Franklin County*, 48 Mo. 167; *State v. Saline County*, 48 Mo. 390; *Carpenter v. Lathrop*, 51 Mo. 483; *Wilkinson v. Peru*, 61 Ind. 1; *Shorter v. Rome*, 52 Ga. 621; *Lane v. Embden*, 72 Me. 354; *Anderson County v. Houston &c. R. Co.*, 52 Tex. 228; *Bargate v. Shortridge*, 5 Cl. (H. L. Cas.) 297; *In re Imperial Land Co.*, L. R. 11 Ex. 478; *Webb v. Herne Bay Comm'rs*, L. R. 5 Q. B. 642.

¹ 133 U. S. 523.

the assessor was not true, but the court held that these defenses were unavailing. "While it is true," said Justice Brewer, delivering the opinion of the court, "that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuance of bonds. It is enough that full control in the matter is given to the officers named."¹

§ 912. The same subject continued — Illustration.— The bonds of a village recited that they were in conformity with the general laws of the State under which the village was incorporated, and were authorized by the board of trustees at a regular meeting thereof held on a designated day. They were signed by the president and clerk of the board, and exceeded in amount the sum for which the board could incur indebtedness without a vote of the electors, which was not had, and were also in excess of the indebtedness which the electors could authorize the board to incur. The Supreme Court of Michigan held that the bonds were void in the hands of an innocent holder.²

§ 913. The same subject continued — Illustration.— A later Michigan case furnishes an excellent illustration of what

¹ Following *Montclair v. Ramsdell*, 107 U. S. 147; *Bernards Township v. Stebbins*, 109 U. S. 341; *New Providence v. Halsey*, 117 U. S. 336, and approving *Cotton v. New Providence*, 47 N. J. Law, 401; *Mutual Ben. L. Ins. Co. v. Elizabeth*, 42 N. J. Law, 235.

² *Spitzer v. Village of Blanchard*, 82 Mich. 234. "In this case," said the court, "there was no authority in the council nor in the president and clerk to issue the bonds in suit, unless first authorized to do so by a vote of the electors, and the law did not make the president and clerk the judges to determine and certify the existence of the fact as to whether there had been an election or not."

In *Brown v. Bon Homme County* (So. Dak., 1891), 46 N. W. Rep. 173, it was held that when the bonds were issued by the chairman and clerk of a board of commissioners, the officials named having no general authority in the premises, their recital of authority conferred upon them by the board was not conclusive. "The doctrine now established," said the court, "making the acts and recitals of the duly authorized agents of the county acting within the scope of their authority obligatory upon the corporation, is sufficiently onerous without adding to it a liability for the acts and recitals of unauthorized agents."

will be deemed a sufficient authority to determine conclusively the existence of conditions precedent to the issue of bonds. A statute provided that "whenever any school district shall have voted to borrow any sum of money the district board of such district is hereby authorized to issue the bonds of such district . . . by the moderator and director of such district . . . in such form . . . as such district board shall direct." The bonds sued on were signed by the moderator and director, and recited that they were issued pursuant to the vote of a meeting held at a day named. The records of the school district failed to show any legal authority for the issue of the bonds. They did show, however, that there was what was claimed to be a meeting held at the time stated in the bond, and that some action was taken at that meeting with reference to the issue of the bonds. The court held that the district could not defend upon the ground that the law had not been complied with previous to the determination of the board to issue the bonds.¹

§ 914. The same subject continued — Illustration.— The rule as declared in New Jersey is that a legislative intent to make a particular officer a tribunal to decide whether the prerequisites to the exercise of the authority existed will not be inferred when the act provides that the existence of such prerequisites shall be made matter of record. In that case the purchaser of the bonds must look to the record for assurance of title. But when the authority of an officer is dependent on facts the existence of which is exclusively or at least peculiarly within his knowledge, the legitimate conclusion is that

¹ *Gibbs v. School Dist.* (Mich., 1891), 50 N. W. Rep. 294, distinguishing *Spitzer v. Village of Blanchard*, 82 Mich. 234. *Champlin, C. J.*, said: — "We think the assertion appearing upon the face of the bond is sufficient evidence to an innocent purchaser that the board ordered and directed the bond to be issued. The officers signing the bond were two of the three officers who constituted the board, and the director is the officer whom the statute requires should

make a record of the proceedings of all district meetings, and the orders, resolutions and other proceedings of the board. It matters not, therefore, that the records kept by the board do not show the order of the board to execute the bonds. The title of a *bona fide* holder of the bond cannot be defeated by a neglect to enter an order in cases where the face of the bond, upon which he has a right to rely, recites that such order was made."

the legislative intent was to invest him with the right to decide as to the facts, and his decision was meant to be final so far as respected purchasers for value and without notice of any flaw in the transaction.¹ In the case last cited the court said:—"The limit of the issue of bonds in this case depended on the valuation of the real property of the township for a certain year, to be ascertained from the assessment rolls (by which I assume was meant the duplicate) for that year. Whether the duplicate assessment of taxes is a public record or not, and in whose custody it lawfully remains after the expiration of the term of office of the collector to whom it was delivered, are questions that have been mooted but not decided.² However they may be answered, it is clear that the duplicate in this case, although a public document, was not accessible to intending purchasers, but was especially accessible to the township officers and the commissioners intrusted with this power. When they issued bonds they averred that the issue was within the limit."

§ 915. The doctrine of the United States Supreme Court summarized.—The doctrine of the Supreme Court of the United States was summarized by Mr. Justice Strong as follows:—"Where legislative authority has been given to a municipality to subscribe for the stock of a railroad company and to issue bonds in payment of the subscription on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened or whether the fact existed which was a necessary condition precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons

¹ Mutual Ben. L. Ins. Co. v. Elizabeth, 42 N. J. Law, 235; Cotton v. New Providence, 47 N. J. Law, 401.

² Hilyard v. Harrison, 37 N. J. Law,

to whom the power to issue the bonds has been conditionally granted."¹

§ 916. **The rule in New York.**—The doctrine of the Court of Appeals of New York in respect to the conclusiveness of recitals by the officers concerned in issuing bonds is directly opposed to that of the federal courts. "There can be no *bona fide* holders of bonds," said Danforth, J.,² "within the meaning of the law applicable to negotiable paper which have been issued without authority. A town has no general authority to issue such bonds. It can issue them only by special authority conferred by some statute. Unless issued in the way pointed out by statute they cannot bind the town." Accordingly it was held that where the statute providing for the issue of bonds required the consent in writing of a majority of the tax-payers, owning more than one-half of the taxable property of the town, and providing that the fact that such majority had been obtained should be proved by affidavit in writing of one of certain specified town officers, and declaring that the affidavit or a certified copy thereof should be evidence of the facts therein contained, the affidavit was not conclusive, but only *prima facie* evidence of the facts stated; and might be disputed in a suit by a *bona fide* holder.³

¹ *Marcy v. Township of Oswego*, 92 U. S. 637, referring to *Town of Coloma v. Eaves*, 92 U. S. 484. Judge Dillon says it seems to be a logical conclusion from the reasoning of the court in the cases involving the force of recitals that "where the power to issue the bonds is given upon the condition of a previous vote in favor of the proposition, the public or municipal officers can, *where no vote whatever has been taken or the proposition has been voted down*, bind the county or municipality by the *false recitals* in such authorized bonds, provided they are issued by the officers intrusted by statute with the power" (1 Dillon on Munic. Corp., § 525); . . . and this, too, it will be observed, where the recital in the bonds was general and not specific in its nature, and

where the facts which would have shown the issue of the bonds to have been illegal were matters appearing upon the public records of the township." 1 Dillon, on Munic. Corp., § 529. In *Dixon County v. Field*, 111 U. S. 83, it was said that "it is not necessary that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statements are authorized to determine and certify."

² *Cagwin v. Town of Hancock*, 84 N. Y. 532.

³ *Cagwin v. Town of Hancock*, 84 N. Y. 532, on the ground that the consent of the tax-payers was a

§ 917. **Signature to bonds.**—If the legislative act is silent as to the officers who shall issue the bonds they should be executed by the municipal officers.¹ Where the name of the proper officer was written by another person at his request and afterward treated by him as his own, by participating in the negotiation and sale of the bonds, they were valid in the hands of a *bona fide* holder.²

fundamental condition precedent to the power to issue bonds, and that it was the manifest intention of the legislature that they should not be issued without such consent. See, also, *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 439, 456; *Dodge v. Platt County*, 82 N. Y. 218; *Town of Venice v. Woodruff*, 63 N. Y. 462; *Town of Duaneville v. Jenkins*, 57 N. Y. 186; *People v. Smith*, 45 N. Y. 781; *People v. Mead*, 24 N. Y. 114; *Williams v. Duaneburg*, 66 N. Y. 129; *Ontario v. Hill*, 99 N. Y. 324; *Mercer County v. Pittsburgh &c. R. Co.*, 27 Pa. St. 389; *Aurora v. West*, 22 Ind. 88; *City and County of St. Louis v. Alexander*, 23 Mo. 483; *State v. Saline County*, 45 Mo. 242. The reasons given in the New York cases were carefully considered in *Town of Venice v. Murdock*, 92 U. S. 494 (on error to the circuit court for the northern district of New York), and pronounced unsound. It was argued that the New York decisions were judicial constructions of a statute of that State, and therefore furnished a rule by which the federal court should be guided. But the Supreme Court did not accept this view, holding that they asserted only general propositions concerning the validity of commercial paper, and applied as well to the execution of powers or authorities granted by private persons as to the issue of bonds under the statute.

¹ *Lane v. Embden*, 72 Me. 354;

Middleton v. Mullica, 112 U. S. 433. Proper officers of a township are the supervisor and clerk. *Walnut Township v. Wade*, 103 U. S. 683; *Town of Windsor v. Hallett*, 97 Ill. 204. See, also, *Kankakee County v. Ætna L. Ins. Co.*, 106 U. S. 663; *Coler v. Board of Comm'rs (New Mex.)*, 27 Pac. Rep. 619.

² *School Dist. v. Xenia Bank*, 19 Neb. 89. See, also, on the same point, *Montgomery v. Township of St. Marys*, 43 Fed. Rep. 362. A public board acts by a majority of its members. *Blair v. Cuming County*, 111 U. S. 363; *Curtis v. Butler County*, 24 How. 435; *Burleigh v. Town of Rochester*, 5 Fed. Rep. 667; *First Nat. Bank v. Arlington*, 16 Blatchf. 57; *Marion County v. Clark*, 94 U. S. 278; *Bissell v. Spring Valley Township*, 110 U. S. 162. If the statute requires the mayor's signature, the council cannot authorize any other person to sign them. *Coler v. Cleburne*, 131 U. S. 162. A Washington statute requiring city bonds to be signed by the mayor of the city was sufficiently complied with by the signature of the person occupying the office at the date of their negotiation and delivery, though he was elected after the day of their date. *Yesler v. City of Seattle (Wash.)*, 25 Pac. Rep. 1014. That a lithograph fac-simile signature may suffice, see *Pennington v. Baehr*, 48 Cal. 565; *McKee v. Vernon County*, 3 Dill. 210.

§ 918. **Sealing.**—Where a statute gave authority to borrow money, etc., and to execute bonds therefor, and provided that the bonds should be under the hands and seals of the commissioners, the direction was declared to be “a matter of form rather than of substance,” “merely a directory requirement,” and “not an essential part of the transaction.”¹

§ 919. **Date — Ante-dating.**—The true date of the issuance of a bond is the date when it actually passes out of the custody and control of the corporation pursuant to contract, and not necessarily the day of the date which it bears.² A registration law was enacted subsequent to a vote for the issue of bonds, but went into effect before the bonds were actually issued. The bonds bore date of the day of the vote, but were signed by one whose authority did not exist until after the

¹Draper v. Springport, 104 U. S. 501, evidently overruling Avery v. Springport, 14 Blatchf. 272, although the latter case is not referred to. See, also, San Antonio v. Mehaffy, 96 U. S. 312; Ring v. Johnson, 6 Iowa, 265; Comm. Ins. Co. v. Cleveland &c. R. Co., 41 Barb. 9; People v. Mead, 24 N. Y. 114, 124; Town of Solon v. Williamsburg Sav. Bank, 114 N. Y. 122. As to sufficiency of seal, Stockton v. Powell (Fla.), 10 So. Rep. 688; Kelly v. McCormick, 28 N. Y. 318; Board of Education v. Fonda, 77 N. Y. 350; United States v. Linn, 15 Peters, 290. Where commissioners intended to issue bonds in behalf of a town pursuant to statute and stated on the face of the bonds that they had done so, and that they had thereto set their hands and seals, and the town received full consideration for the bonds, and the purchasers bought them in the open market, in good faith and for value, and in ignorance of the want of seals, it was held that a court of equity having jurisdiction of the cause and of the parties would prevent the formal defect of the want of seals from be-

ing set up to defeat an action at law upon the bonds. Bernards Township v. Stebbins, 109 U. S. 341, citing Smith v. Aston, Freem. Ch. 388; Cockerell v. Cholmeley, 1 Russ. & Myl. 418, 429; Rutland v. Paige, 24 Vt. 181; Wisner v. Blachly, 1 Johns. Ch. 607; Green v. Morris &c. R. Co., 1 Beas. (N. J.) 165; Druiff v. Parker, L. R. 5 Eq. 131. And that the failure to observe the omission of the seals was not such negligence as to be fatal. Citing Wadsworth v. Wendell, 5 Johns. Ch. 224; Montville v. Houghton, 7 Conn. 543; Harris v. Pepperell, L. R. 5 Eq. 1; Elliott v. Sackett, 108 U. S. 132. In Draper v. Springport, 104 U. S. 501, Justice Bradley said: — “Whether the deviation from the directions of the statute, in the form of the obligations, may not have the effect of notice to the holder, sufficient to allow the other defenses to be set up, is a question which it is unnecessary at this time to decide. It may admit of much consideration.”

²School Dist. v. Xenia Bank, 19 Neb. 89.

registration act was passed, and they were not registered in compliance with that statute. They were decided to be invalid in the hands of a *bona fide* holder.¹ The same result was reached where the bonds were not signed by an officer who was in office when they were signed, but by a person who was in office on the ante-dated day on which they bore date.² But a purchaser ignorant of the fact that the bonds were invalid on account of such a defect may recover the money actually received by the corporation.³

§ 920. To whom payable.—An act authorizing a subscription in aid of a railroad provided that the bonds should be made payable to the company “and their successor and assigns,” but they were drawn payable to the company or bearer. It was insisted that the divergence from the prescribed formula was a fatal defect. But the court held that the requirement was only directory, and moreover that the irregularity being committed by the servants of the municipality the latter was estopped to take advantage of it.⁴

§ 921. Place of payment.—It has been repeatedly decided by the United States courts that the power of a municipal corporation to make any contract does not depend upon the place of performance but upon its scope and object; and that no legal principle is violated if its bonds are made payable at

¹ *Anthony v. County of Jasper*, 101 U. S. 693, clearly distinguishing *Town of Weyauwega v. Ayling*, 99 U. S. 112, where a town was held estopped from proving that the bonds were actually signed by a former clerk after he went out of office, because the clerk in office adopted that signature as his own when he united with the chairman of the board in delivering the bonds.

² *Coler v. Cleburne* (1889), 131 U. S. 162.

³ *Louisiana v. Wood*, 102 U. S. 294. It is not necessary that the bonds be dated on the day of the ordinance

providing for their issue. *Flagg v. Palmyra*, 33 Mo. 440.

⁴ *Supervisors v. Galbraith*, 99 U. S. 214; *Indianapolis R. Co. v. Hurst*, 93 U. S. 29; *Township of Rock Creek v. Strong*, 96 U. S. 271; *Bargate v. Shortridge*, 5 Clark (H. L.), 297. A bond payable to bearer is transferable by delivery like a bank note. *Commonwealth v. Allegheny County*, 37 Pa. St. 237. Coupon bonds are negotiable though not made payable to any particular person. *Smith v. Clark County*, 54 Mo. 58; *McCoy v. Washington County*, 3 Phila. 381.

a distant place instead of the treasury of the corporation;¹ but a contrary rule is thoroughly established in Illinois.²

§ 922. **Time of maturity.**—Bonds may be made payable in a shorter time than that provided for by statute. In declaring that such bonds were not *ultra vires* the Supreme Court of New Jersey said:—"If the contract was in opposition to express legislation, to public policy or to any general principle of law, then such contract must fail; but its want of coincidence with mere naked formalities or statutory directions not intended to be of the essence of the thing authorized will not have such effect. The circumstance that the bonds were required to be payable in twenty years rather than in five or within any other designated period could not be a matter of substance or anything but an immaterial incident to the act authorized."³

¹ *Meyer v. City of Muscatine*, 1 Wall. 384; *Lynde v. Winnebago County*, 16 Wall. 6; *Thompson v. Lee County*, 3 Wall. 327; *Lexington v. Butler*, 14 Wall. 282; *Calhoun County Sup. v. Galbraith*, 99 U. S. 214; *Gelpcke v. Dubuque*, 1 Wall. 175; *Mygalt v. Green Bay*, 1 Biss. (U. S.) 292.

² *People v. Tazewell County*, 23 Ill. 147, where the court said:—"States, counties and corporations created for public convenience only are not required to seek their creditors to discharge their indebtedness, but when payment is desired the demand shall be made at their treasury. That is the only place where the treasurer can legally have the public funds with which he is intrusted. To authorize the auditor to draw his warrants on the treasurer, payable in a sister State or in a foreign country, necessarily imposes an obligation on the treasurer to provide funds at that place to meet them, and his duties requiring him at the treasury would require the employment of agents, the transmission of the funds at a

risk of loss and at a considerable expense in charges, insurance and discounts, which are not incident to its payment at the treasury." The rule applies to cities, counties and public corporations generally, and in the absence of legislative enactment "they have no power to make their indebtedness payable at any other place than at their treasury." *Demand on such bonds should be made at the treasury.* *Pekin v. Reynolds*, 31 Ill. 529. See, also, *Prettyman v. Tazewell County*, 19 Ill. 406; *Johnson v. Stark County*, 24 Ill. 75.

³ *Singer Mfg. Co. v. Elizabeth*, 42 N. J. Law, 249, 257. See, also, *Township of Rock Creek v. Strong*, 96 U. S. 271; *Mott v. United States Trust Co.*, 19 Barb. 569; *Northwestern Mut. Ins. Co. v. Overholt*, 4 Dill. 287; *De Voss v. Richmond*, 18 Gratt. 338. *Contra*, *Potter v. Town of Greenwich*, 26 Hun, 326. See, also, *Davis v. Yuba County*, 75 Cal. 452; *Woodruff v. Okolona*, 57 Miss. 806; *Cairo &c. R. Co. v. Sparta*, 77 Ill. 505. Power to issue bonds to mature fifteen years from the date of the statute is lawfully exercised

§ 923. **Delivery.**—The act of delivery is essential to the existence of any deed, bond or note. Although drawn and signed, so long as it is undelivered it is a nullity; “not only does it take effect only *by* delivery but also *on* delivery.”¹ Where a town had ample authority for issuing its bonds to a railroad company as a donation or subscription, and the bonds were executed in proper form and made payable to the proper company, but were delivered to the secretary of a new company, and there was nothing pertaining to them or that could have been ascertained from the record indicating their delivery to one not entitled to receive them, they were held to be enforceable in the hands of an innocent purchaser.²

§ 924. **Quality of municipal bonds as commercial paper.** Municipal bonds payable to bearer are uniformly placed on the same footing as other negotiable paper. They are transferable by delivery, and when issued by and under competent authority pass into the hands of a *bona fide* purchaser for value before maturity freed from any infirmity in their origin.³ “Whatever fraud the officers authorized to issue

by issuing bonds four years after date of the act to mature in eleven years. *Gilchrist v. Little Rock*, 1 Dill. 261. *Cf. Green v. Dyersburg*, 2 Flip. (U. S.) 477; *Brownell v. Town of Greenwich*, 114 N. Y. 518. Bonds payable “in twenty-five years after date,” with a stipulation that “this bond will be redeemed, if desired, twelve years after date,” means that they are to run for twenty-five years and cannot be redeemed until then without the consent of the holder. *Allentown School Dist. v. Derr*, 115 Pa. St. 439. The time for which the bonds are to run may be estimated from a future date if the latter be reasonable. *Daws v. Town of Elmwood*, 34 Fed. Rep. 114; *Marion County v. Clark*, 94 U. S. 278.

¹*Young v. Clarendon Township*, 132 U. S. 340, 353. Citing *Bayley v. Taber*, 5 Mass. 286; *Marvin v. McCulloch*, 20 Johns. 288; *Ward v. Churn*,

18 Gratt. 801; *Lovejoy v. Whipple*, 18 Vt. 379.

²*Town of Prairie v. Lloyd*, 97 Ill. 179. A conditional delivery would bind the company but not the creditors of the company having no knowledge of the conditions. *Thomas v. Morgan County*, 39 Ill. 496.

³*Cromwell v. Sac County*, 96 U. S. 51; *New Providence v. Halsey*, 117 U. S. 336; *Ottawa v. First Nat. Bank*, 105 U. S. 342; *Wilson County v. Third Nat. Bank*, 103 U. S. 770; *Block v. Bourbon County Comm'rs*, 99 U. S. 686; *Comm'rs v. Block*, 99 U. S. 686; *Calhoun County v. Galbraith*, 99 U. S. 214; *Macon County v. Shores*, 97 U. S. 272; *Humboldt Township v. Long*, 92 U. S. 642; *United States v. Union Pac. R. Co.*, 91 U. S. 72; *Burleigh v. Town of Rochester*, 5 Fed. Rep. 667; *Marshall County v. Schenck*, 5 Wall. 784; *Gelpcke v. Dubuque*, 1 Wall. 175;

them may have committed in disposing of them, or however entire may have been the failure of the consideration promised by parties receiving them, these circumstances will not affect the title of subsequent *bona fide* purchasers for value before maturity or the liability of the municipalities.”¹

§ 925. Coupons.—The interest certificates attached to bonds are termed coupons and are so called because they are detachable. As regards their form and execution the law governing the bonds themselves equally applies. When they are made negotiable, as they generally are, by the words “to order” or “bearer,” no defenses can be raised as against their validity which could not be raised against the bonds, as they are in fact part of the bond. But they are, when containing the proper words, negotiable instruments themselves; and it has been held that when detached from the bonds and payable to bearer, although overdue, they are still negotiable instruments.² Where a mortgage is given, the coupons are equally with the bonds a part of the mortgage debt, and upon foreclosure the holders are entitled to share *pro rata* in the

Mercer County v. Hackett, 1 Wall. 83; *Moran v. Miami County*, 2 Black, 722; *White v. Vermont &c. R. Co.*, 21 How. 575; *Lexington v. Butler*, 14 Wall. 282; *St. Joseph v. Rogers*, 16 Wall. 644; *Blackman v. Lehman*, 63 Ala. 545; *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110; *National Bank v. Kirby*, 108 Mass. 497; *San Antonio v. Lane*, 32 Tex. 405; *Boss v. Hewett*, 20 Wis. 460; *Burnham v. Brown*, 23 Me. 400; *Gorgier v. Millville*, 3 Barn. & C. 45; *Brooks v. Mitchell*, 9 M. & W. 15; *Goodwin v. Roberts*, L. R. 1 App. Cas. 476; *Ackley School Dist. v. Hall*, 113 U. S. 135.

¹ *Field, Justice*, in *Cromwell v. Sac County*, 96 U. S. 51, 57. It was there held that an overdue and unpaid coupon for interest, attached to a municipal bond which has several years to run, does not render the bond and the subsequently maturing

coupons dishonored paper so as to subject them in the hands of a purchaser for value to defenses good against the original holder; and that such a holder is entitled to recover its full amount against the maker, although he may have paid less than its par value, whatever may have been its original infirmity. “This rule in no respect infringes upon the doctrine that one who makes only a loan upon such paper or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured.” Citing *Stoddard v. Kimball*, 6 Cush. 469; *Allaire v. Harts-horne*, 21 N. J. Law, 665; *Williams v. Smith*, 2 Hill, 301; *Chicopee Bank v. Chapin*, 8 Met. 40; *Lay v. Wissman*, 36 Iowa, 305.

² *Thompson v. Perrine*, 106 U. S. 589; *Grand Rapids &c. R. Co. v. Sanders*, 54 How. Pr. 214.

proceeds.¹ All holders of detached coupons are upon the same level, and there is no priority in the order of their payment out of the proceeds of a mortgage; nor have they any precedence over the bonds to which they were originally attached.²

§ 926. Payment of coupons.— A coupon becomes due and payable on the day fixed in the bond and coupon for payment, but it has been decided and it is accepted that they are entitled to three days of grace like other negotiable instruments.³ Upon the expiration of the days of grace and non-payment they are dishonored and pass subject to all equities existing against the transferrer. But the presumption exists in favor of the holder that he is a holder for value before maturity, and the burden of proof devolves upon him who contests the payment.⁴ Contrary to the ordinary rule governing negotiable paper, a coupon need not be presented for payment unless there are words in it requiring the holder to make a demand.⁵

§ 927. Interest upon interest.— Coupons being negotiable instruments in themselves are as a matter of course entitled to interest upon their face value after non-payment at maturity.⁶ Ordinarily demand is not necessary to fix the time from which

¹ Union Trust Co. v. Monticello & C. R. Co., 63 N. Y. 314; Haven v. Grand Junction & D. Co., 109 Mass. 88; County of Beaver v. Armstrong, 44 Pa. St. 63. And if by a condition in the mortgage, securing the bonds, they become prematurely due, the holder is entitled to payment of the coupons which become subsequently due. Welsh v. First Div. R. Co., 25 Minn. 314.

² Ketchum v. Duncan, 96 U. S. 659; Sewall v. Brainard, 38 Vt. 364.

³ Jones on Railway Securities, § 326; Evertson v. First National Bank, 66 N. Y. 14. *Contra*, Daniels on Negotiable Instruments (3d ed.), § 1490a. Money bonds and interest coupons are not entitled to days of grace in Massachusetts. Chaffee v. Middlesex R. Co., 146 Mass. 224, 335.

⁴ Murray v. Lardner, 2 Wall. 110.

⁵ Jones on Railway Securities, § 325; Walnut v. Wade, 103 U. S. 683; Warner v. Rising Fawn Iron Co., 3 Woods, 514. But see Gorman v. Sinking Fund Comm'rs, 25 Fed. Rep. 647, which holds that, where the holder of State coupons has a right to have them funded, he must offer them and demand that they be funded in order that his right may be fixed. It is no excuse that his demand would have been fruitless.

⁶ Pana v. Bowler, 107 U. S. 529; Koshkokong v. Burton, 104 U. S. 668; Walnut v. Wade, 103 U. S. 695; Amy v. Dubuque, 98 U. S. 471; Gelpcke v. City of Dubuque, 1 Wall. 175; Ashuelot R. Co. v. Elliott, 57 N. Y. 397; North Pa. R. Co. v. Adams, 54 Pa. St. 94; City of Jeffersonville v. Patterson, 26 Ind. 16; Welsh v. First Div. & C. R. Co., 25 Minn. 320.

the interest is to run. But if the bond is payable at a particular time on demand, it is a condition precedent and must be complied with.¹ The interest upon coupons after maturity is not calculated at the rate expressed in the bond, but at the legal rate.²

§ 928. Refunding, substituted and renewal bonds.—When the municipality has the power to issue bonds and they have been issued, it may substitute other bonds of the same nature in their stead—may change the form though not the substance of its liability. To do this, however, there must be a substantial consent of the holders of the original bonds. Likewise refunding bonds may be issued to redeem those falling due. When they are issued under the proper conditions, which is determined by the legislative enactment, the municipality is liable as under the original issue.³

§ 929. The same subject continued.—The municipality, by issue of the new bonds, waives any defenses it may have to the old bonds. By the new issue it obtains an advantage in postponing the time of payment, and generally in the rate of interest; and after the holders of the original issue have surrendered their evidence, the town will not be permitted to set up old irregularities as defenses which the creditor had

¹ *Aurora City v. West*, 7 Wall. 82; *R. Co.*, 2 S. C. 248; *Spencer v. Pierce*, 5 R. I. 63.

² *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Jones on Ry. Securities*, § 332. Where the corporation in its answer sets up that it had money and was ready to pay coupons had they been presented, it is sufficient to defeat the claim for interest. *Walnut v. Wade*, 103 U. S. 683. The same rule obtains when the coupon holders are non-residents of the country and have failed to make demand and are unable to prove that the corporation was unable or unwilling to pay them upon demand. *Emden v. Lehig Coal Co.*, 47 Pa. St. 76.

³ *Cromwell v. County of Sac*, 96 U. S. 51; *Långston v. South Carolina*

³ *Jasper Co. v. Ballou*, 103 U. S. 745; *Little Rock v. Merchants' Sav. Bank*, 98 U. S. 308; *Portland Sav. Bank v. Evansville*, 25 Fed. Rep. 389; *Galena v. Corwith*, 48 Ill. 423; *Sullivan v. Walton*, 20 Fla. 552. See, also, *Blanton v. McDowell Co.*, 101 N. C. 532, where it was held that under the constitution of North Carolina a new issue of bonds declaring that they are in place of bonds maturing and are a continuation of the old liability need not be submitted to a vote of the people. The same remedies may be used for the enforcement as were provided in the old issue. *People v. Lippincott*, 81 Ill. 193.

the right to assume were waived when it made him the new offer. The municipality must do equity.¹ So careful have the courts been to protect the interests of holders of renewal bonds, that where an old issue had been held invalid and the municipality could not ordinarily issue new bonds in renewal, yet where it was specially authorized to issue new bonds in payment of its indebtedness, the holders of the original bonds were deemed creditors and were entitled to new bonds.² When, however, the bonds were issued in positive violation of statute, the holders of old bonds cannot substitute them.³

§ 930. Estoppel by matter in pais.— Before the bonds are actually issued or the rights of third parties have attached to the transaction the question of estoppel cannot arise,⁴ and it is generally declared that there can be no estoppel to set up a want of power to issue the bonds.⁵ In *Pendleton v. Amy*⁶ a county had authority to issue bonds upon a vote by a majority of the real-estate holders. No vote was actually taken, but it was held estopped to set up that defense for reasons which were stated by Mr. Justice Strong as follows:—“The county received in exchange for the bonds a certificate of stock of the railroad company, which it held about seventeen years

¹ *Jasper Co. v. Ballou*, 103 U. S. 745; *County*, 3 Dill. 300; *Union Pac. R. Warren Co. v. Marcy*, 97 U. S. 97; *Co. v. Merrick County*, 3 Dill. 359; *Moultrie Co. v. Rockingham &c. Bank*, 92 U. S. 621; *Douglass Co. v. Portland &c. R. Co. v. Hartford*, 58 Me. 23.
² *Bolles*, 94 U. S. 104; *Marcy v. Oswego Township*, 92 U. S. 637. A holder of valid bonds who has surrendered them for renewal bonds subsequently held invalid may sue upon the original bond although it has been canceled. *Deyo v. Otoe County*, 37 Fed. Rep. 247; *Gause v. Clarksville*, 1 McCrary, 78; *Platts-mouth v. Fitzgerald*, 10 Neb. 401.

³ *Town of Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122. See, also, *Hill v. Peekskill Sav. Bank*, 101 N. Y. 490.

⁴ *McKee v. Vernon County*, 3 Dill. 210; *Horton v. Town of Thompson*, 71 N. Y. 513.

⁵ *Union Pac. R. Co. v. Lincoln*

⁵ See § 936, *infra*; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121. “By want of power . . . is meant the want of any existing valid legislative act authorizing the municipality to make the bonds or instruments; not irregularities in the exercise of the power, but want of legislative power itself.” 1 Dillon on Munic. Corp. (4th ed.) 545. In another place Judge Dillon defines *ultra vires*, when used in this connection, as “the want of legislative power, under any circumstances or conditions, to do the particular act in question.” 1 Dillon on Munic. Corp. (4th ed.), § 548.

⁶ 13 Wall. 297.

before the present suit was brought and which it still holds. Having exchanged the bonds for the stock, we think the county cannot retain the proceeds of the exchange and assert against a purchaser of the bonds for value that though the legislature empowered it to make them and put them upon the market, upon certain conditions, they were issued in disregard of the conditions."¹ And where an election was ordered by the wrong authority the same rule was applied.²

§ 931. Estoppel to set up over-issue in violation of statute.— A statute enabling a township to issue its bonds provided that the amount of bonds voted should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the annual interest. The bonds were executed by the officers designated in the act, and contained a recital of the act and that they were issued "in virtue of and in accordance" with it, and "in pursuance of and in accordance with the vote [required in the act] of three-fifths of the legal voters . . . at an election held," etc. It was held by a divided court that in the face of this recital it was no defense that the amount issued was in excess of the statutory limit.³

¹ *Pendleton v. Amy*, 13 Wall. 297 (three judges dissenting). Cf. *Marsh v. Fulton County*, 10 Wall. 676.

² *Marshall County Sup. v. Schenck*, 5 Wall. 772. (*Contra*, *Marshall County v. Cook*, 38 Ill. 44.) See, also, *Redd v. Henry County*, 31 Gratt. 695. And that an estoppel to set up irregularities arises from levy of taxes, payment of interest, or retention of consideration. *Ray County v. Vansycle*, 96 U. S. 675; *McKee v. Vernon County*, 3 Dill. 210; *Luling v. Racine*, 1 Biss. 314; *Jasper County v. Ballou*, 103 U. S. 745; *Beloit v. Morgan*, 7 Wall. 619; *New Haven R. Co. v. Chatham*, 42 Conn. 465; *People v. Cline*, 63 Ill. 394; *Schaeffer v. Bonham*, 95 Ill. 368; *Goshen Township v. Shoemaker*, 12 Ohio St. 624; *Whiting v. Town of Potter*, 18 Blatchf.

165, 180; *Alvord v. Syracuse*, 98 N. Y. 599 (cf. *Town of Mentz v. Cook*, 108 N. Y. 505); *Moulton v. Evansville*, 25 Fed. Rep. 382; *Portsmouth Sav. Bank v. Springfield*, 4 Fed. Rep. 276. See, also, *Anderson County v. Beal*, 113 U. S. 227; *Town of East Lincoln v. Davenport*, 94 U. S. 801; *Belo v. Forsythe County*, 76 N. C. 489; *Lane v. Schomp*, 20 N. J. Eq. 82; *McPherson v. Foster*, 43 Iowa, 48; *Butler v. Dunham*, 27 Ill. 474.

³ *Marcy v. Township of Oswego*, 92 U. S. 636. See, also, *Humboldt Township v. Long*, 92 U. S. 642; *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625; *Wilson v. Salamanca*, 99 U. S. 499; *Dallas County v. McKenzie*, 110 U. S. 686; *Darlington v. Laclede*, 4 Dill. 200; *Nicolay v. St.*

§ 932. Over-issue in violation of the constitution—No estoppel by recitals.—It was held in *Buchanan v. Litchfield*¹ that where a bond showed on its face that the aggregate issue was in excess of the constitutional limit of indebtedness the municipality was not estopped from setting up that fact to defeat an innocent holder by a recital that it was issued under and in pursuance of the constitution of the State. The case was distinguished from previous decisions where the over-issue was in violation of a statutory limitation. It was followed in *Dixon County v. Field*,² in which the court said:—“There was no power at all conferred to issue bonds in excess of an amount equal to ten per cent. upon the assessed valuation of the taxable property of the county. The amount of the bonds issued was known. It is stated in the recital itself.” In the still later case of *Lee County v. Graham*³ the court declared the same doctrine. These cases are further considered in the opinion delivered by Justice Lamar in *Chaffee County v. Potter*,⁴ which is quoted in the following section.

§ 933. The same subject continued — The rule qualified.—In *Chaffee County v. Potter*⁵ the bonds were issued under authority of the same statute of Colorado as were those which were litigated in *Lake County v. Graham*.⁶ But there was this difference: that in the Chaffee county case the bonds contained the additional recital that “the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado,” and did not show upon their face as did those in the Lake county case how many bonds were issued or how large each series was. These features were held to distinguish it from the Lake county case and to estop the county from setting up that the issue actually exceeded the constitutional limit of indebtedness.⁷

Clair County, 3 Dill. 163; *Sherman County v. Simons*, 109 U. S. 735; *Cummins v. Lawrence County* (So. Dak.), 46 N. W. Rep. 184.

³ 130 U. S. 674. See, also, *Comm’rs v. District Township of Doone*, 42 Fed. Rep. 644.

¹ 102 U. S.

⁴ 142 U. S. 355.

⁵ 142 U. S. 355.

² 111 U. S. 83. See, also, *Northern Bank of Toledo v. Porter Township*, 110 U. S. 608, and especially *Nesbit v. Independent Dist. of Riverside* (U. S., 1892), 12 S. Ct. Rep. 746.

⁶ 130 U. S. 674, cited in the preceding section.

⁷ “We held in that case [the Lake county case],” said Justice Lamar, “that the county was not estopped

§ 934. *Bona fide holders.*—A *bona fide* holder of bonds must be a purchaser for value without notice or the successor

from pleading the constitutional limitation because there was no recital in the bonds in regard to it, and because also, the bonds showing upon their face that they were issued to the amount of \$500,000, a purchaser having that data before him was bound to ascertain from the records the total assessed valuation of the taxable property of the county and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the constitution; and that the bonds having been issued in violation of that provision of the constitution were not valid obligations of the county. Our decision was based upon the ruling of this court in *Dixon County v. Field*, 111 U. S. 83. To the views expressed in that case we still adhere, and the only question for us now to consider, therefore, is: Did the additional recital in these bonds above set out, and the absence from their face of anything showing the total number issued of each series and the total amount in all, estop the county from pleading the constitutional limitation? In our opinion these two features are of vital importance in distinguishing this case from *Lake county* and *Dixon county*, and are sufficient to operate as an estoppel against the county. Of course the purchaser of bonds in open market was bound to take notice of the constitutional limitation of the county with respect to indebtedness which it might incur. But when upon the face of the bonds there was an express recital that that limitation had not been passed and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in

the *Lake county* case and in *Dixon County v. Field*, that as a matter of fact the constitutional limitation had been exceeded in the issue of the series of bonds. The purchaser might even know, in fact it may be admitted that he would be bound to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power under the constitution in the premises. True, if a purchaser had seen the whole of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is: What does each individual bond disclose? . . . The statute in terms gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the constitution of the State and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves do not show such recital to be untrue under the law, estops the county from showing that it is untrue."

of one who was.¹ A party with notice may buy from one without notice and will be protected. The object of the rule is to protect the *bona fide* holder, and to enable him to transfer the security to others with the same immunity which attaches in his own hands.² But where the holder of bonds had such knowledge of the circumstances under which they were issued as to preclude a recovery by him, and he delivered them to his attorney to sell, who, having the same information, sold them to a client, the plaintiff, it was held that the latter was not a *bona fide* purchaser of the bonds.³ The pendency of a suit relating to the validity of negotiable bonds not yet due is not constructive notice to holders thereof.⁴ Where the validity of a bond is litigated and a decree entered before its maturity denying the right of the holder to sustain the suit, the decree is not effectual against the bond itself.⁵ But a purchaser of overdue bonds, after a judgment rendered that the bonds are void, is bound by the judgment.⁶

¹ McClure v. Oxford Township, 94 U. S. 429. "A purchaser without notice . . . takes a title purged of any fraud or infirmity. This title he can transfer, and it is immaterial whether the person to whom he transfers it knows of the taint or infirmity or not." Suffolk Sav. Bank v. Boston, 149 Mass. 364.

² City of Lynchburg v. Slaughter, 75 Va. 57; 1 Daniel on Negotiable Instruments, 803; Cromwell v. Sac County, 96 U. S. 51; Cass County v. Green, 66 Mo. 498; Suffolk Sav. Bank v. Boston, 149 Mass. 364.

³ Carter v. Ottawa, 24 Fed. Rep. 546.

⁴ Scotland County v. Hill, 132 U. S. 107; Olcott v. Fond du Lac County, 16 Wall. 678; Warren County v. Marcy, 97 U. S. 96; Warren County v. Post, 97 U. S. 110; Orleans v. Platt, 99 U. S. 676; Cass County v. Gillett, 100 U. S. 585; Warren County v. Portsmouth Sav. Bank, 97 U. S. 110; Leitch v. Wells, 48 N. Y. 586; Durant v. Iowa County, 1 Woolw. (U. S.) 69; Keiffer v. Ehler, 18 Pa. St. 388; Stone v. Elliott, 11 Ohio St. 252; Mims v. West, 38 Ga. 18; Winston v. West-

feldt, 22 Ala. 760. This general rule cannot be changed by State laws or decisions so as to affect the rights of persons not residing and not being within the State, any more than the publication of suit can be made constructive service of process upon such persons. Rights to real property and personal chattels within the jurisdiction of the court and subject to its power may be affected by *lis pendens* but not those acquired by the transfer of negotiable securities. Town of Enfield v. Jordan, 119 U. S. 680. See, also, Brooklyn v. Insurance Co., 99 U. S. 362; Empire v. Darlington, 101 U. S. 87; Pana v. Bowler, 107 U. S. 545.

⁵ Town of Enfield v. Jordan, 119 U. S. 680. See, also, Carroll County v. Smith, 111 U. S. 556, where it was held that municipal officers might, notwithstanding an injunction against them, give a good title to one who purchased from them without notice.

⁶ Lewis v. Brown Township, 109 U. S. 162.

§ 935. The same subject continued.—One is not the less a *bona fide* holder for value of municipal bonds because he took them in pledge to secure a debt¹ or in payment of an antecedent debt.² The fact that overdue coupons are attached to the bond does not necessarily charge a purchaser with notice of defenses.³

§ 936. Defenses available against *bona fide* holders.—An entire want of power to issue the bonds renders them invalid even in the hands of a *bona fide* holder.⁴ Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which upon their face refer to the

¹ Allen v. Dallas &c. R. Co., 3 Woods (C. C.), 316.

² Mobile Sav. Bank v. Oktibbeha County, 24 Fed. Rep. 110; Foote v. Hancock, 15 Blatchf. 373. A *bona fide* purchaser of stolen bonds will be protected. Planters' Ass'n v. Avigno, 28 La. Ann. 552; Battles v. Laudenslager, 84 Pa. St. 446; Elizabeth v. Force, 29 N. J. Law, 587. Irregularities in an election which would have been fatal to the issue of bonds on objection before issue are of no avail when raised for the first time in a suit on the bonds by a *bona fide* holder. State v. Board of Comm'rs, 39 Kan. 657; State v. Montgomery, 74 Ala. 226. Municipal officers, after having issued the full authorized amount of corporate bonds, received a quantity of them back, canceled them, and issued in their stead to the holder other bonds to the same amount, but of a different denomination, the change being made for convenience in negotiating them. It was held that this irregularity could not, in equity, be used to invalidate the bonds in the hands of a *bona fide* purchaser. Town of Solon v. Williamsburg Sav. Bank, 114 N. Y. 122.

³ Cromwell v. Sac County, 96 U. S. 58; Miller v. Berlen, 13 Blatchf. 245; State v. Cobb, 64 Ala. 127; Rouse v. Jersey City, 18 Fed. Rep. 719. Cf. First Nat. Bank v. Scott, 14 Minn. 77. And see Parsons v. Jackson, 99 U. S. 434; Indiana &c. R. Co. v. Sprague, 103 U. S. 756.

⁴ St. Joseph Township v. Rogers, 16 Wall. 644; Merchants' Bank v. Bergen County, 115 U. S. 384. "There can be no estoppel in favor of *bona fide* holders where there is an entire absence of power." 15 Am. & Eng. Encyc. of Law, 1292, and cases cited. Where the act authorizing the issue of bonds imposes upon the officers signing them the duty to determine whether there has been a compliance with its terms and provisions, and the recitals state such a compliance, the corporation is estopped as against an innocent purchaser to claim that the bonds are invalid on any other ground than that upon their face they appear to have been issued in violation of some constitutional or statutory restriction. Township of Washington v. Coler (U. S. Cir. Ct. App., 1892), 51 Fed. Rep. 362.

statute under which they are issued is bound to take notice of the statute and all its requirements.¹

§ 937. **The same subject continued.**—The *bona fide* holder for value of a bond containing no recitals, apparently one of a series issued under authority of an act of the legislature of the State but actually in excess of the number of bonds authorized by that act, and as security for the personal debt of a fiscal officer of the corporation to the holder, was held not entitled to recover.² A municipal bond which on its face refers to the statute under which it purports to be issued, and is so numbered as to make it apparent, from an examination of the statute and proceedings thereunder, that it was issued without authority, is void; nor can one holding it claim to be a *bona fide* purchaser for value.³

¹ McClure v. Oxford Township, 94 U. S. 429; National Bank v. St. Joseph, 31 Fed. Rep. 216; Pana v. Lipincott, 2 Ill. App. 466. See, also, Aurora v. West, 22 Ind. 88; George v. Oxford Township, 16 Kan. 72; Bates County v. Winters, 97 U. S. 85; La Moille Valley & C. R. Co. v. Fairfield, 51 Vt. 257; Lewis v. Bourbon County, 12 Kan. 186; Veeder v. Lima, 19 Wis. 280.

² Merchants' Bank v. Bergen County, 115 U. S. 384. See, also, the Floyd Acceptances, 7 Wall. 666; Marsh v. Fulton, 10 Wall. 676.

³ Thompson v. Mamakaling, 37 Hun, 400. The purchase of school-district bonds charges the purchaser with knowledge of the financial condition of the district in so far as it affects the constitutional power of the district to issue the bonds. Nesbit v. Riverside School District, 25 Fed. Rep. 635. The holder of municipal bonds who took them knowing that conditions had not been complied with by the railroad company in whose favor they were issued is not a *bona fide* holder, and the fact of

non-compliance with the conditions may be set up by the municipality in his suit against it. Mobile Savings Bank v. Oktibbeha County Supervisors, 24 Fed. Rep. 110. Where a city has by ordinance granted a franchise to S. and his assigns for thirty years, to construct and maintain water-works, purchasers of bonds issued by the assigns of S., and secured by a mortgage on the water-works, franchise, contracts, etc., though they purchase in good faith, acquire no rights, as against the city, which will deprive it of a right to rescission of the contract, to which it would have been entitled as against S. or his assigns, since they purchased the bonds knowing that the city was not a party to them, and that they were subject to a compliance with the terms of the ordinance, of which they were bound to take notice. Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156. In a suit on municipal bonds fraudulently issued, plaintiff must show himself a *bona fide* holder for value. Tracey v. Phelps, 22 Fed. Rep. 634.

CHAPTER XXIV.

CHARITIES AND CORRECTION.

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| <p>§ 938. General rules governing directors of poor, etc.</p> <p>939. Rulings in Massachusetts as to overseers of the poor.</p> <p>940. Rulings in Maine and New York.</p> <p>941. Contracts by governing boards for the support of the poor.</p> <p>942. Discretionary powers of governing boards.</p> <p>943. Medical treatment for the poor.</p> <p>944. The same subject continued.</p> <p>945. Settlement of paupers — Generally.</p> <p>946. The same subject continued.</p> <p>947. The same subject continued — Illegitimate children.</p> <p>948. Massachusetts decisions on settlement of soldiers mustered out of service.</p> <p>949. Settlement of married women.</p> <p>950. Settlement acquired by residence and payment of taxes.</p> <p>951. The same subject continued.</p> <p>952. Constitutionality of laws for the removal of paupers.</p> <p>953. Rulings on removal of paupers.</p> <p>954. Notice in cases for removal of paupers.</p> <p>955. Notice of charge by one town to another.</p> <p>956. What corporations are liable for support of paupers.</p> <p>957. No implied liability.</p> <p>958. Special liabilities.</p> <p>959. Various rulings as to the poor.</p> | <p>§ 960. Support of patients at State lunatic asylums.</p> <p>961. The same subject continued.</p> <p>962. Support of insane poor further considered.</p> <p>963. Aid to children.</p> <p>964. Liability of the corporation for support furnished to paupers.</p> <p>965. The same subject continued.</p> <p>966. Duty to furnish immediate relief.</p> <p>967. Proceedings to compel relative to support paupers.</p> <p>968. Liability of a pauper for his support.</p> <p>969. Municipality cannot recover for voluntary aid.</p> <p>970. Actions for support of paupers.</p> <p>971. The same subject continued.</p> <p>972. Statutes prohibiting the bringing of paupers from other States.</p> <p>973. Liability to pauper for negligence of employees.</p> <p>974. Support of the insane.</p> <p>975. The same subject continued.</p> <p>976. Soldiers' homes.</p> <p>977. Reformatories.</p> <p>978. Liability of counties for the care of prisoners.</p> <p>979. Care of prisoners continued.</p> <p>980. Hiring of convicts.</p> <p>981. Liability for personal injuries to prisoners.</p> <p>982. The same subject continued.</p> |
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§ 938. General rules governing directors of poor, etc.—
The directors of the poor of a county can perform no official

act, nor bind the county by any contract, except when lawfully convened and acting as such.¹ The Indiana statute which requires each township trustee to keep a "poor book" in which shall be enrolled all those in his township who, in his judgment, will require assistance from the public, does not prevent the trustee from granting relief to one not enrolled in his "poor book."² The Pennsylvania statute which makes it the duty of the county auditors to audit the accounts of the directors of the poor "and of the treasurer and steward of each and every poor-house," etc., authorizes the auditing of accounts of the treasurer of directors of the poor.³

¹ *Nason v. Directors of Poor* (1889), 126 Pa. St. 445; s. c., 17 Atl. Rep. 616; 24 W. N. C. 60, in which a settlement of accounts between the members of the board of directors of poor with the treasurer of the board was held to be no settlement at all. See, also, *School Dist. v. Fuess*, 98 Pa. St. 600, where Trunkey, J., said of a board of school directors:—"The directors as a board must exercise their power; the board may make contracts, may authorize a committee to make a contract, and may appoint an agent for a proper and specific purpose. One or more of the directors, without authority from the board, can make no contract binding upon the district, cannot change a contract, can do no act fixing the district for a liability. He may be personally responsible to those who suffer from his unauthorized act, as any citizen would be."

² *Board of Comm'rs v. Osborn* (Ind., 1892), 31 N. E. Rep. 541. And a decision of a trustee that the necessities of one in his township are such as to entitle him to public aid is final and conclusive. *Comm'rs v. Holman*, 34 Ind. 256; *Washburn v. Board*, 104 Ind. 321; s. c., 3 N. E. Rep. 757.

³ *Nason v. Directors of the Poor* (1889), 126 Pa. St. 445; s. c., 17 Atl. Rep. 616; 24 W. N. C. 60, holding the

treasurer of the directors of the poor liable to account according to the report of the county auditors. It was also held that this treasurer was not relieved from liability on his bond for the safe-keeping of public moneys on account of the failure of the bank in which he deposited the funds. See, also, *Baily v. Commonwealth* (Pa.), 20 W. N. C. 221; s. c., 9 Cent. Rep. 223. In *Board of Comm'rs v. McLeod* (1885), 34 Kan. 306, it was held that the superintendent of a county asylum, in the management thereof, and in the care and custody of paupers placed therein, was under the control and subject to the order and direction of the board of county commissioners; and therefore, where the commissioners find that persons who have been placed in such asylum are no longer entitled to support at the public expense, and make an order directing the superintendent to discharge them from the asylum, it is his duty to comply with such order. In *Smith v. Comm'rs* (1879), 21 Kan. 669, it was held that the county was not liable for the services of a physician as rendered and medicines furnished during an epidemic in a township by order of the township trustee, it appearing that the county had a poor-house and the powers of a township

§ 939. Rulings in Massachusetts as to overseers of the poor.—Overseers of the poor are public officers who commonly act under the authority of the law and not as agents of the town. But in some matters they may represent the town as its agents.¹ They have the care and custody of the paupers in their respective cities and towns, and are to see that they are suitably relieved, supported and employed; but the city or town is to direct the manner and provide the means of supporting its paupers.² If a town sees fit to buy a farm and cultivate it in connection with an almshouse, there is nothing in the statute which gives the overseers of the poor a right to manage it without authority from the town.³

§ 940. Rulings in Maine and New York.—Towns in Maine have the discretionary power to choose any number of overseers

trustee were limited in such counties as had poor-houses to relieving paupers by sending them to the poor-house. This case also gives some rules prevailing in such counties different from those where there are no poor-houses.

¹ *New Bedford v. Taunton* (1864), 9 Allen, 207.

² *Pub. Stats. Mass.*, ch. 84, § 2.

³ *Neff v. Wellesley* (1889), 148 Mass. 487; s. c., 20 N. E. Rep. 111. In *Inhabitants of Oakham v. Inhabitants of Sutton* (1847), 13 Met. 192, it was held that support granted to a person, as a pauper, by the overseers of the poor of the town in which he has a settlement will prevent his acquiring a settlement in another town in which he resides, although the act of the overseers in granting such support be not ratified by the town of whose poor they are overseers. The ground of this decision was that acts done by these officers in pursuance of their authority and duty needed no ratification to make them binding on the town. *Rev. Stats.*, ch. 46, §§ 1, 2, 13, 26; *Belfast v. Leominster*, 1 Pick. 123. *Shaw, C. J.*, in another place says:—"If overseers, who are bound

by law to afford immediate relief to actual want, and who must act upon the evidence before them, are sometimes deceived by appearances, still, their acts done in good faith must be deemed acts binding on the town." In *New Bedford v. Taunton* (1864), 9 Allen, 207, the court held the admission of overseers of the poor, in a binding-out indenture, that a certain pauper was chargeable to their town, and their acts in paying bills to other towns for his support, were not admissible in evidence against the town in a litigation for the purpose of showing the residence of that pauper and his descendants to be in the town; the reason being, as given by the court, that:—"The overseers exercise their discretion upon the evidence before them, and the town is bound by their acts as officers of the law having power by statute to bind them as to those particular matters; but the inhabitants are not the actors through the overseers as their agents; and as such determinations are made without any hearing of parties interested, their binding force should be limited to the particular transaction."

of the poor not exceeding twelve; but if they deem the election of separate overseers unnecessary, the duties pertaining to those officers are to be discharged by the selectmen, of whom there must be three, five or seven.¹ The election of a county superintendent of the poor, under the New York act which authorizes and requires the board of supervisors of the county of Richmond to elect an officer to be known as "county superintendent of the poor," who was to be keeper of the poor-house by virtue of his office, operated as a removal of a keeper of the poor-house who had been appointed prior to the passage of the act.² The overseers of the poor of a town, whose board is annually re-constituted by the retirement of one member and the election of another, under the Massachusetts statute, have no authority, while acting as almshouse directors, to bind a town respecting the management of the almshouse for the next municipal year.³

§ 941. Contracts by governing boards for the support of the poor.—The Indiana statute which provides as follows:—"It shall be lawful for the board of county commissioners of any county of this State, whenever it may deem it advisable,

¹ *Inhabitants of Lyman v. Inhabitants of Kennebunkport* (1891), 83 Me. 219; s. c., 22 Atl. Rep. 102, in which case the court held that the election of only one overseer of the poor was valid, and overruled the defense that the notice from the town suing another for supplies furnished a pauper from one overseer of the poor was not regular and sufficient in form and that the town should not recover.

² *People v. Weldon* (1891), 14 N. Y. Supl. 147, in which it was held that the former appointee could not recover in an action for his salary as keeper of the poor-house for the balance of the year for which he had been appointed, as his action assumed. His appointment under the Laws of New York, 1847, chapter 498, as amended by the Laws of New York, 1862, chapter 298, was subject

to a power given therein to remove him.

³ *Reed v. Lancaster* (1890), 152 Mass. 500; s. c., 25 N. E. Rep. 974, which sustained the exceptions to a judgment in favor of one who brought action on an agreement for the rendering of personal services to a town entered into with him by a board of overseers of the poor, after its re-constitution under the statute. The court held it was an invalid executory contract, and that it could not be ratified by the members of the re-constituted board acting separately. While they may act by a majority, the members are still to act together. *Mayor & Aldermen v. Railroad Comm'rs*, 113 Mass. 161; *Shea v. Milford*, 145 Mass. 525. They also held that the continuance of services under such a contract, and knowledge on the part of the new

to purchase a tract of land in the name of such county, and thereon to build, establish and organize an asylum for the poor, and to employ some humane and responsible person, resident in such county, to take charge of the same upon such terms and under such restrictions as the board shall consider most advantageous for the interests of the county, who shall be called the 'Superintendent of the county asylum,'” confers the power upon the board to contract with one as superintendent for a period of five years, and such a contract will not be disturbed unless there has been an abuse of discretion by the board in making it.¹ And such a contract cannot be assailed on the ground that it extended beyond the official term of the members making it.² Nor is it void as in contravention of public policy for the reason that to uphold it would put it in the power of one board of commissioners to bind the hands of its successors; and that it operates as an unwarranted abridgment of the 'administrative, executive and legislative' powers of the board.³ But the statute which author-

member of the board that there was some sort of agreement for such services of the terms of which he had been only partially informed, were insufficient to show a ratification by the board as re-constituted.

¹ Board of Comm'rs v. Shields (Ind., 1891), 29 N. E. Rep. 385.

² Board of Comm'rs v. Shields (Ind., 1891), 29 N. E. Rep. 385. This rule is based upon the ruling of courts—that the board of commissioners constitutes a corporation, and that its rights, duties and liabilities are substantially the same as those of a municipal corporation. See, also, Platter v. County of Elkhart, 103 Ind. 360, 369; s. c., 2 N. E. Rep. 544, 549. In State v. Clark, 4 Ind. 315, it was said:—"In legal contemplation the board of commissioners is the county." As to power to make contracts with agents to carry out the purposes or attain the objects for which a corporation is established, see City of Indianapolis v. Gas Co.,

66 Ind. 396; City of Logansport v. Dykeman, 116 Ind. 15; s. c., 17 N. E. Rep. 587; Valparaiso v. Gardner, 97 Ind. 1; Duncan v. Board, 101 Ind. 403; Crow v. Board, 118 Ind. 51; s. c., 20 N. E. Rep. 642; City of Vincennes v. Callender, 86 Ind. 484; Crowder v. Town of Sullivan, 128 Ind. 486; s. c., 28 N. E. Rep. 94.

³ Board of Comm'rs v. Shields (Ind., 1891), 29 N. E. Rep. 385. The court said:—"It [the board] is a continuous body. While the personnel of the membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners the duration of which extends beyond the term of service of its then members is not therefore invalid for that reason. As individuals they are not parties to it." Reu-

izes the board of commissioners to discontinue the poor-farm and asylum and dispose of the property at any time forms a part of such a contract, and carries into it an implied condition subjecting it to the discretionary power of the board to so discontinue; and where a contract does not attempt to bind the board not to discontinue it is valid.¹ If a board waive the making of the report by the superintendent which the law requires him to make, as it is for their information only, they cannot rescind a contract with him because the report was not made.² And if a superintendent becomes a candidate for office with the consent of the board; and while a candidate supervises the farm under their direction and causes the work to be done at his expense, and neither the county nor the paupers nor the asylum suffers any damage, the loss of time on his part would not be such a breach of contract as would justify his dismissal by the board.³

§ 942. Discretionary powers of governing boards.—The power to purchase and receive a conveyance of land for a poor-house and to make the necessary improvements is expressly given to the county court by the Kentucky statute; and the county judge and justices, who constitute the county court, alone are the judges of the necessity of such an expenditure.⁴ Under the New York statute which provides

belt v. School Town of Noblesville, 106 Ind. 478; s. c., 7 N. E. Rep. 206; Wait v. Ray, 67 N. Y. 36.

¹ Board of Comm'rs v. Shields (Ind., 1891), 29 N. E. Rep. 385.

² Board of Comm'rs v. Shields (Ind., 1891), 29 N. E. Rep. 385.

³ Board of Comm'rs v. Shields (Ind., 1891), 29 N. E. Rep. 385.

⁴ Jones v. Pendleton County Court (Ky., 1892), 19 S. W. Rep. 740, sustaining the dismissal of this action of a tax-payer so far as it sought to enjoin making such a purchase. The court said:—"It is well-settled law that such tribunals [county courts] are alone to determine the wants and necessities of matters pertaining to the government and control of county

affairs; and so long as they act within their jurisdiction, no one can interfere, unless there is fraud or corruption, or some individual right is to be affected by their action. In the performance of their duties, the mode of its exercise, and the discretion connected with it, are with the court and not with the tax-payer." Again:—"It [the county court] is authorized by law to make such appropriations, and the tax-payer is not; and if the discretion of a county court is to be questioned in a court of equity by a tax-payer in regard to appropriations within the scope of its authority or as to the wants of the county, it would be impossible for that tribunal to discharge the du-

that "the powers and duties heretofore conferred upon and exercised by the supervisors of the respective towns in said county of Montgomery, so far as relates to the adjudication in relation to and the relief and support of the poor, are hereby conferred upon the overseers of the poor of the respective towns in said county," the overseer of the poor in one of those towns is the sole and exclusive judge (subject, perhaps, to review for abuse of that power) as to who are paupers of the town, and consequently who may be relieved by him. In furnishing such relief he is necessarily invested with the power to make contracts for the care of such as he may adjudge paupers, and the exercise of that power cannot be reviewed collaterally either in a court or by the town auditors.¹

§ 943. Medical treatment for the poor.— Where a county has made suitable provision for the medical treatment of the poor in a township, the trustee has no authority to engage other physicians to render the service.² But where the physician so employed abandons the contract or refuses to perform it, or is at such a distance that his attendance cannot be readily procured, and an emergency exists, it is equivalent to no provision by the county, and the trustee is authorized to act.³ In an action against a county by a physician employed by a township trustee for services rendered to a pauper under the statute, where the county had provided a physician for the township, the burden is on the plaintiff to show a necessity for employing a physician other than the one provided by the county.⁴

ties and obligations imposed on it by statute."

¹ *Christman v. Phillips* (1890), 58 Hun, 282; s. c., 12 N. Y. Supp. 338, which reversed the court below in its directing a verdict in this action for defendant on proof that the town-board orders, on which suit was brought, given by the overseer of the poor, defendant here, to the plaintiff's assignors in payment for services rendered by them as nurses of a pauper by contract with the overseer of the poor, had been pre-

sented to the town board of auditors for payment and disallowed by them on the ground that they were not proper charges against the town.

² *Board v. Boynton*, 30 Ind. 359; *Board v. Hon*, 87 Ind. 356; *Board v. Scaton*, 90 Ind. 158; *Washburn v. Board*, 104 Ind. 321.

³ *Conner v. Board &c.*, 57 Ind. 15.

⁴ *Board of Comm'rs v. Osborn* (Ind., 1892), 31 N. E. Rep. 541, holding, also, that an order from a trustee to render such services need not be in writing.

Employment by a trustee is *prima facie* evidence that the county has failed in the first instance to contract with a physician to treat the poor, and casts the burden of showing otherwise upon the defendant.¹ Under the Indiana statute which makes it the duty of the county commissioners to employ physicians for the poor, but authorizes the overseers of the poor in townships not otherwise provided for to employ such medical or surgical services as paupers within their jurisdiction may require, the overseer of the poor may, at the county's expense, employ a physician to treat a pauper in urgent need of medical aid where the regular county physician refuses to take the case.²

§ 944. The same subject continued.—Where a county physician refuses to attend a poor person in destitute circumstances and requiring immediate medical assistance, the overseer of the poor of the proper district of the county may employ a physician for that purpose, and the county will be liable for the fair value of his services.¹ An overseer of the poor, in making contracts for the support and labor of the

¹ Board v. Ritter, 90 Ind. 362.

² Board of Comm'rs v. Lomax (Ind., 1892), 81 N. E. Rep. 584. But it was held that no recovery could be had upon a case showing that the overseer of the poor had not requested the services of the county physician simply because he considered him incompetent. Under this statute the support of the poor is made a county charge. The township trustees only perform such duties with reference to the poor as may be prescribed by law. If the overseer of the poor exceeds his authority the county is not bound. Those who accept employment from him must, at their own risk, inquire into his power to bind the county. Robbins v. Board &c., 91 Ind. 537; Washburn v. Board &c., 104 Ind. 321; s. c., 3 N. E. Rep. 757; Morgan County v. Seaton, 122 Ind. 521; s. c., 24 N. E. Rep. 213. In County of Christian v. Rockwell

(1886), 25 Ill. App. 20, the court sustained a judgment in favor of a physician against a county, for services in amputating a leg of a boy whose mother was dead, and whose father was without means and did nothing towards his support, holding that though the boy owned an interest in real estate of a small value, not sufficient to pay the amount properly due for such services, the physician was not obliged to exhaust that before bringing suit; also, that it was a case, he needing immediate attention, where the emergency was such as to warrant immediate action on the part of plaintiff without waiting to confer with county officials. See, also, Seagraves v. City of Alton, 13 Ill. 366, 371; Board of Supervisors v. Reynolds, 49 Ill. 186; Perry County v. City of Du Quoin, 99 Ill. 479.

¹ Gage County v. Fulton (1884), 16 Neb. 5.

poor, under the discretion vested in him by the statutes, acts as the agent of the town under the authority of the law to make the contracts for the town.¹ And he may make a contract as to a pauper's labor and support, and make a settlement under the contract which will be binding on the pauper.² A physician cannot recover of a town for medical services to paupers of a town on a contract which he has made with the supervisors of a town, rendered at a time beyond their term of office, where it is shown that the contract was limited to their term of office and so understood by the physician.³

§ 945. Settlement of paupers — Generally.—As to the settlement of paupers the legislatures of the different States, in the exercise of their discretion, have established systems of positive rules, and the courts give a strict construction to these statutes and act upon the principle declared in the case cited in the note.⁴ This principle was that the obligations of towns to support paupers result from provisions of positive law; that towns must be brought strictly within them; and that analogy, equitable construction and approximation are all insufficient.⁵

¹ *Billings v. Kneen* (1885), 57 Vt. 428. See, also, *Poquet v. North Hero*, 44 Vt. 91, holding that a selectman, in making a contract that he was authorized to make, was an agent of the town, and not a party to the contract.

² *Billings v. Kneen*, 57 Vt. 428. In *Fletcher v. Inhabitants of Belfast* (1885), 77 Me. 334, the city, which by an ordinance had appointed a city physician for the poor under a contract that as additional compensation for his services rendered in that capacity he should have all moneys collected of other towns for medicines and supplies furnished by the city to paupers chargeable to such towns, was held liable, in an action for money had and received, for a sum of money collected in a suit of another town, although the council

had appropriated the same to another purpose, to the payment of one carning for its poor under contract.

³ *Jones v. Town of Lind* (1891), 79 Wis. 64; s. c., 48 N. W. Rep. 247.

⁴ *Berlin v. Bolton*, 10 Met. 115.

⁵ *Shrewsbury v. Salem*, 19 Pick. 389; *Middleborough v. Plympton*, 19 Pick. 489; *Robbins v. Townsend*, 20 Pick. 349. In *Southborough v. Marlborough*, 24 Pick. 166, it was said that the rule itself is of less importance than that it should be fixed and known. In *Town of Rockingham v. Town of Springfield* (1887), 59 Vt. 521; s. c., 9 Atl. Rep. 241, the court sustained an order of removal of a mother and her three children, who had come to reside in a town which had on her request furnished aid to her children, but had never acquired a residence therein, to a town in

§ 946. The same subject continued.—The rules as to settlement were declared in an Illinois case. Persons under legal restraint and insane persons are incapable of losing or gaining a residence, which rule applies to persons confined in prisons, lunatics confined in an asylum and paupers sent to a poor-house. Where one comes into a county or town, and makes no arrangement for a home, and has no fixed or actual residence, but hires out and is employed by some person, his apparent residence is at the place of his employment.¹

which it was discovered afterwards that she had a settlement; ruling incidentally that the furnishing to her children aid, her husband having deserted her, was furnishing it to her as the head of the family, and that though she was going from town to town seeking and doing work, she was constructively present when the order of removal was made. See, also, as to the furnishing of the supplies to the children being the furnishing to her, *Croydon v. County of Sullivan*, 47 N. H. 179; as to her residence in the town where her children were left, for all legal purposes affecting its remedy against the town of her legal settlement continuing unbroken, *Middlebury v. Waltham*, 6 Vt. 200; *Stamford v. Readsboro'*, 46 Vt. 611; *Desmare v. United States*, 93 U. S. 605, 610; *Mitchell v. United States*, 21 Wall. 350; *Abington v. North Bridgewater*, 23 Pick. 177. In *Merrimack County v. Grafton County* (1886), 63 N. H. 550, it was held that residence without relief in a county for one year fixed the liability of a county for sums expended by another county in aid of a pauper, under the statute which makes liable for the support of a pauper the county in which he has been relieved within a year or in which he has last resided for a year. Commenting upon the laws making at one time and abolishing at another town settlements the

court said:—"Pauper settlements are the mere creations of the statutes and may be made or unmade at the pleasure of the legislature. No vested rights can accrue to any one to retain a settlement thus gained, longer than the statute giving it shall remain in force." *Northfield v. Merrimack County*, 43 N. H. 165. *Town of Worcester v. Town of East Montpelier* (1888), 61 Vt. 139, as to the liability of towns for the support of paupers being purely statutory, and *Town of Chittenden v. Town of Barnard* (1888), 61 Vt. 145.

¹*County of Franklin v. County of Henry* (1887), 26 Ill. App. 193. See, also, *Town of Freeport v. Board of Supervisors* (1866), 41 Ill. 495; *Payne v. Town of Dunham*, 29 Ill. 125; *Upton v. Northbridge*, 15 Mass. 547; *Reading v. Westport*, 19 Conn. 561; *Amherst v. Hollis*, 9 N. H. 107; *Winchenden v. Hatfield*, 4 Mass. 123; *Anderson v. Canton*, 13 Mass. 547. In *Eatontown v. Shrewsbury* (1886), 49 N. J. Law, 188; s. c., 6 Atl. Rep. 319, the court construed the poor-act of New Jersey, which provides that in order to gain a settlement the pauper must be seized of a freehold estate of the value of \$130, and dwell thereon or in the township in which the estate is situate for one continuous year, not to require the continuous actual presence of the party, but to be satisfied by an unbroken

§ 947. The same subject continued — Illegitimate children.— Where a town in a suit brought against it for support of a pauper by another admits that at the age of twenty-one the person aided had a residence therein, the burden is upon

residence on the estate or in the township. It was further held that the continuity of such "dwelling" would not be broken by temporary absences for business or pleasure, accompanied with a continued intent to return when the purpose of the absence had been accomplished. See *Queen v. St. Leonard*, 1 Q. B. 21; *Queen v. Glosop*, 1 Q. B. 227; *Queen v. Abingdon*, 5 Q. B. 406; *Queen v. St. Key*, 7 Q. B. 467; *Queen v. Worcester*, 9 Q. B. 340; *Overseers of Manchester v. Guardians &c.*, 16 Q. B. 723. In *Inhabitants of Belmont v. Vinalhaven* (1890), 82 Me. 524; s. c., 20 Atl. Rep. 89, it was held that the voting lists of a town on which the name of a voter is checked with a cross are *prima facie* evidence, in a case against the town for the support of such voter as a pauper, that the pauper voted at the election at which such lists were used. In *Derry v. Rockingham County* (1883), 62 N. H. 485, it was held that the assessor's valuation of the estate of a person, under the New Hampshire statute providing that any person having real estate of the value of \$150 in the town where he lives, on which he pays the taxes for four consecutive years, gains a settlement in the town, was not conclusive as to the value thereof; therefore, in a case involving the settlement of a pauper to fix a liability for his support upon a town, it was proper to have the value of such estate submitted to and settled by a jury. In *Burke Co. Comm'rs v. Buncombe Co. Comm'rs* (1888), 101 N. C. 520; s. c., 8 S. E. Rep. 176, it was held that a complaint in an ac-

tion against a county for taking care of an insane pauper, which alleged that such pauper was an inmate of the almshouse of that county, under lawful authority, from which she escaped and came into the complaining county, sufficiently alleged that she was "last legally settled" in the defendant county, under the North Carolina poor-laws; also that though the complaint showed that the pauper was continuously in the complaining county for almost six years, it was demurrable under the code, which provides that one year's continuous residence shall confer a legal settlement, where it is also shown that during such time she was an inmate of the almshouse of the complaining county, and insane. *Neal v. Comm'rs of Burke*, 85 N. C. 420. In *Overseers of Taylor v. Overseers of Shenango* (1886), 114 Pa. St. 394; s. c., 6 Atl. Rep. 475, it was held that the district in which a poor person having no legal settlement within the State of Pennsylvania first becomes helpless and a fit subject for relief must provide for the same until the necessity therefor ceases. The court said:—"For the purpose of carrying out their spirit [the spirit of the poor-laws], one who has no actual settlement anywhere must be considered as having acquired a *quasi*-settlement in a poor-district by reason of his having become helpless and requiring assistance therein." *Overseers v. McCoy*, 3 P. & W. (Pa.) 342, 344; *Kelly Township v. Union Township*, 5 Watts & Serg. 535; *Lower Augusta v. Selinsgrove*, 64 Pa. St. 166. In *Overseers of Gilpin*

such town to show that he had thereafter acquired a residence in the town suing by having his home therein for "five successive years without receiving supplies as a pauper," and that any absences therefrom during the five years were of such a character as not to interrupt his residence.¹ The Supreme

Tp. v. Overseers of Polk Tp., 118 Pa. St. 84; s. c., 11 Atl. Rep. 791, it was held that an order of removal of an alleged poor person who had never been a burden to the township by relief obtained, made upon the information of the overseers that he was likely to become chargeable, but without an adjudication by the justices of the necessary facts, with notice to the person affected, was void. *Fitchburg v. Lunenburg*, 102 Mass. 358, 361; *Hanson v. South Scituate*, 115 Mass. 336; *City of Newburyport v. City of Waltham*, 150 Mass. 569; s. c., 23 N. E. Rep. 379; *City of Newburyport v. City of Waltham*, 150 Mass. 311; s. c., 23 N. E. Rep. 46.

¹*Searsmart v. Lincolnville* (1890), 83 Me. 75; s. c., 21 Atl. Rep. 747; *Ripley v. Hebron*, 60 Me. 379. In *Martin v. Stanabach* (N. J., 1891), 22 Atl. Rep. 58, it was held that the settlement of a bastard child is at the place of the legal settlement of its mother at the time of its birth; but unless it appears that the mother has a legal settlement elsewhere in the State, the legal settlement of such a child must be held to be in the township where it is born. *Nottingham v. Amwell*, 21 N. J. Law, 27; *Paterson v. Byram*, 23 N. J. Law, 394; *McCoy v. Newton*, 37 N. J. Law, 133. In *South Brunswick v. Township of Cranberry*, 53 N. J. Law, 126; s. c., 20 Atl. Rep. 1084, it was held that an order of removal, not appealed from, is conclusive as to the settlement of a poor person, not only on the townships in the litigation, but is a defense available by another township when application

is made and proceedings taken to charge it with the support of such person, if no subsequent legal settlement has been acquired by the poor person. *Elizabeth v. Westfield*, 7 N. J. Law, 439; *Little Falls v. Bernards*, 44 N. J. Law, 621. In *Barre v. Coventry* (1890), 63 Vt. 95; s. c., 20 Atl. Rep. 925, it was held that a pauper who had left defendant town in 1869 and resided with his father from November 1, 1869, to November 27, 1872, in another town, and from September, 1873, to February, 1877, in still another, had no such residence in the defendant town as to entitle the plaintiff town to recover from it for support furnished to this pauper by the latter. In *Overseers of Poor of Walker Tp. v. Overseers of Poor of Marion Tp.* (Pa., 1892), 23 Atl. Rep. 1002, it was held that the facts that an immigrant who had acquired a legal settlement in one township and had afterwards gone with his uncle and lived on a farm bought by this uncle in another township, the products of which farm were divided between them, without any accounting as to contributions, and it being understood that when the uncle and wife died this nephew should inherit the property, would not justify an inference that this nephew had leased the premises of his uncle for one year, and under the act of June 13, 1836, section 9, paragraph 3, had acquired a settlement in this last township. In *Overseers of Poor of Cascade Tp. v. Overseers of Poor of Lewis Tp.* (Pa., 1892), 23 Atl. Rep. 1003, it was held that a person who had lived on leased

Court of Pennsylvania sustained an appeal from an order of removal of a woman and three children as paupers to another township on the ground that though the woman had married and borne three children to a man resident of this other township, it being shown that at the time of the supposed marriage the man was an undivorced husband, the settlement of this man did not become her settlement. Her settlement continued as before marriage and that of her illegitimate children followed hers.¹

§ 948. Massachusetts decisions on settlement of soldiers mustered out of service.—Massachusetts has a statute as to acquiring a settlement which provides that “any person who was duly enlisted and mustered into military service during the late civil war, as a part of the quota of any city or town in the commonwealth, and become disabled from disease contracted while engaged in such service, shall be deemed to have acquired a settlement in such city or town.” A town which had expended money in relief of a pauper who had been discharged from the army sought in an action to recover from a city the money thus expended, on the contention that he was discharged, after enlisting from this city, on account of disease contracted in the service and had therefrom acquired a settlement in the city. The court sustained instructions directing a verdict for defendant in the court below.²

premises from the forenoon of April 2, 1890, until the forenoon of April 1, 1891, had lived there for a whole year, fractions of a day not being regarded, and had thereby acquired a settlement under the poor-laws in that township.

¹ Wayne Tp. v. Porter Tp. (1890), 138 Pa. St. 181; s. c., 20 Atl. Rep. 939.

² Inhabitants of South Scituate v. Inhabitants of Scituate (Mass., 1892), 29 N. E. Rep. 639. The court held that a duly authenticated copy of the surgeon's certificate made at the time of the pauper's discharge from the service, and stating that he was “incapable of performing the duties

of a soldier because of epilepsy,” was conclusive evidence of the cause of his discharge and therefore the best evidence, and should have been introduced by the plaintiff on the question of the pauper's disability; further, that assuming the record showing that the pauper was examined and passed for enlistment should have the effect of a certificate that the surgeon examining him found no disability to prevent enlistment, and that the evidence was competent, it was not conclusive; and conceding that the fact of the pauper's examination and muster would have some tendency to show freedom from a disabling disease at

§ 949. **Settlement of married women.**—The New Jersey statute which provides “that any person or persons who shall have last resided in any township of this State for the period of ten consecutive years shall be considered as legally settled in said township” has been construed several times by the Supreme Court of New Jersey. In one case it was held that a woman who had previously to her marriage resided in a town for ten consecutive years, but married a husband whose settlement was in another township, and afterwards returned to the township in which she had had a settlement before marriage, did not thereby re-acquire a settlement in that town. Under the statute the former settlement of the wife was lost or suspended by her marriage, and her settlement followed that of her husband, and as long as she was not divorced from him continued there.¹

the time of enlistment, where the plaintiff introduced the pauper and other witnesses, who testified that the disease existed prior to enlistment, it was proper for the court to withdraw the case from the jury and direct a verdict for the defendant. See, also, *Waltham v. Newburyport*, 150 Mass. 569; s. c., 23 N. E. Rep. 379; *Fitchburg v. Lunenburg*, 102 Mass. 358, 361; *Hanson v. South Scituate*, 115 Mass. 336; *Newburyport v. Waltham*, 150 Mass. 311; s. c., 23 N. E. Rep. 46; *Ashland v. Marlborough*, 106 Mass. 266. An act of congress provided “that all persons in the naval service of the United States who have entered said service during the present rebellion, who have not been credited to the quota of any town, district, ward or State, by reason of their being in said service and not enrolled prior to February 24, 1864, shall be enrolled and credited to the quota of the town, ward, district or State in which they respectively reside, upon satisfactory proof of their residence made to the secretary of war.” The statute of Massachusetts known as the settle-

ment law of the State fixed the settlement of these persons referred to in the United States statute, using the words, “or duly assigned as a part of the quota thereof after having been enlisted into said service.” In *City of Boston v. Mount Washington* (1885), 139 Mass. 15; s. c., 29 N. E. Rep. 60, the Supreme Court held the town liable for expenses incurred in the support of a pauper who had been assigned to the town as a part of its quota in the naval service of the United States; also that, although he was enlisted and mustered into that service several days before the beginning of the war of the Rebellion, he was “duly assigned” to that town within the meaning of the settlement act. See, also, *Brockton v. Uxbridge*, 138 Mass. 292; *Sheffield v. Otis*, 107 Mass. 282, 285; *Bridgewater v. Plymouth*, 97 Mass. 382.

¹ *Bateman Overseer of Poor v. Mathes* (N. J., 1892), 24 Atl. Rep. 444, sustaining on *certiorari* the order of the court below removing the pauper wife and children to the township in which the husband had settlement. The act was held to be retro-

§ 950. Settlement acquired by residence and payment of taxes.—The statute of New Hampshire exempts every person seventy years old from poll tax. Another statute provides that every person who has resided in a town for seven years and shall have paid all taxes legally assessed on his poll or estate during such term shall gain a settlement therein. Construing the two statutes together, the Supreme Court of that State have held that a person who has paid such taxes in a town for six years, but in his seventieth year pays none by reason of his exemption, acquires no settlement in the town so as to make him chargeable as a pauper to that town.¹

spective in *Marlboro' Tp. v. Freehold*, 50 N. J. Law, 509; s. c., 14 Atl. Rep. 595; *Franklin Tp. v. Lebanon Tp.*, 51 N. J. Law, 93; s. c., 16 Atl. Rep. 184. In the latter case the court said the statute "includes cases in which the stated period of residence had been completed before the act was passed, and those in which it was then running as well as those in which it should thereafter begin." In the first case the true meaning and construction of the statute was declared to be that "an actual legal settlement is imparted to every one by ten years' continuous residence, whether the person be a minor or an adult, or with or without a prior legal settlement, and such settlement continues until another is gained." That a wife can acquire no separate settlement during the coverture, at least not in the absence of desertion; see, also, *Little Falls v. Bernards*, 44 N. J. Law, 621; *McLorinam v. Bridgewater Tp.*, 49 N. J. Law, 624; s. c., 10 Atl. Rep. 187. The Massachusetts statute provides that "Any woman of the age of twenty-one years who resides in any place within this State for five years together shall thereby gain a settlement in such place." The next clause reads:—"The provisions of the preceding clause shall apply to married women who have not a set-

tlement derived by marriage under the provisions of the first clause, and to widows. . . ." In *Marden v. City of Boston* (Mass., 1892), 29 N. E. Rep. 588, an action to recover expense and charges for the support of an alleged widow, an insane pauper, at a lunatic hospital, the court, considering the evidence as to absence of the husband from his family for more than twenty years a sufficient evidence of his death to establish the widowhood of the pauper patient, held that under clause 7 of the settlement law the provisions of clause 6 applied even to those widows who had settlements derived from their former husbands, and that the city was liable for her support. See, also, *Somerville v. Boston*, 120 Mass. 574, a decision prior to the passage of the statute, which is now clause 7. As to the capacity of a wife to acquire a settlement, see *Shirley v. Watertown*, 3 Mass. 322; *Hallowell v. Gardner*, 1 Me. 93; *Augusta v. Kingsfield*, 36 Me. 285; *Richmond v. Lisbon*, 15 Me. 434; *Thomaston v. St. George*, 17 Me. 117; *Winchendon v. Hatfield*, 4 Mass. 123; *Athol v. New Salem*, 7 Pick. 42.

¹ *Town of Sunapee v. Town of Lempster* (1874), 65 N. H. 655; s. c., 23 Atl. Rep. 525. The construction of statutes for acquiring a settlement in towns has always been strict.

§ 951. The same subject continued.—An adult person, in order to gain a settlement in a town or city under the Massachusetts statute which declares him a resident for such purposes by a five years' residence and the payment of all taxes assessed to him "for any three years within that time," must have resided within the town or city during the whole of the three years for which the taxes were assessed.¹ A township-

Weare v. New Boston, 3 N. H. 203; Burton v. Wakefield, 4 N. H. 47; Henniker v. Weare, 9 N. H. 573; Tamworth v. Freedom, 17 N. H. 279. In *Overseers of Poor of Laurence Tp. v. Overseers of Poor* (Pa., 1892), 23 Atl. Rep. 1124, the court ordered the discharge of an order of removal of a pauper from a township to another, claiming that he had acquired a settlement in the latter by the payment of taxes for two years under the terms of the statute which provides that "A settlement may be gained in any district . . . by any such person who shall be charged with and pay his proportion of any public taxes or levies for two years successively." The court held in this case that a pauper cannot be said to have acquired a settlement by the payment of taxes for two successive years where the tax of one of the years was paid by a third person, who did not claim to represent the pauper or say anything explanatory of his act, but who according to the statement of the tax collector was one of a committee sent to him to pay taxes, to enable delinquents to vote. It was also held that a person who was charged with and actually paid his taxes for two successive years would not be prevented from obtaining a settlement in such township by the fact that he accepted from the other township temporary relief in the spring of one of the years, under an order for which he did not apply,

where it did not appear that he was receiving aid as a pauper when the taxes were assessed and paid. The facts of this case do not bring it within the principle of *Overseers of Lewisburg v. Overseers of Milton* (Pa.), 18 W. N. C. 141, where it was held that a person who is chargeable to and receiving aid as a pauper from one district cannot acquire a settlement in another so long as that relation exists. Same view of the law in *Overseers of Washington Tp. v. Overseers of East Franklin Tp.*, 3 Penn. (Pa.) 108; *Poor Dist. of Lock Haven v. Poor Dist.* (Pa.), 13 Atl. Rep. 742.

¹ *City of Taunton v. Wareham* (1891), 153 Mass. 192; s. c., 26 N. E. Rep. 451. This was an action for recovery of a town from which he had removed to the city for the support of a pauper in the State lunatic asylum by the city from which he was committed to the State lunatic asylum, but not on the application of the overseer of the poor. The town contended that he had acquired a settlement in the city, and that the latter was chargeable with his support. The court held that by his commitment to the hospital and his then becoming a public charge his capacity to gain a settlement in the city ceased at that time. See *Choate v. Rochester*, 13 Gray, 92; *Worcester v. Auburn*, 4 Allen, 574; *Boston v. Wells*, 14 Mass. 384, holding that to gain a settlement a citizen must

road tax is a public tax within the meaning of the Pennsylvania statute which provides that a settlement may be gained in any poor district by any person who shall come to inhabit in the same and "shall be charged with and pay his proportion of any public taxes or levies for two years successively."¹

§ 952. Constitutionality of laws for the removal of paupers.—The question as to whether the enactment by a legislature of a statute authorizing the governing authorities of a municipal corporation to order the removal of paupers who have come within its limits and are liable to become a charge upon the corporation, to another in which they have acquired a legal settlement, is an interference with the rights of personal liberty "without due process of law," seems to have been

dwell in the town the same three years that he holds therein an estate of freehold of the value prescribed by the statute in case of freehold giving a settlement. *Southborough v. Marlborough*, 24 Pick. 166, where it was held that as a person did not reside in the town for the same five years for which he was assessed he did not there gain a settlement, although he had resided there more than five years. *Wakefield v. Alton*, 3 N. H. 378; *Tamworth v. Freedom*, 17 N. H. 279; *Barre v. Greenwich*, 1 Pick. 129.

¹*Huston Tp. Poor Dist. v. Benetzette Tp. Poor Dist.* (1890), 135 Pa. St. 393. The court said:—"A settlement under the poor-laws is a residence of such permanent and continuing character as, under certain circumstances, will entitle a person to support or assistance as a pauper. When not derived by birth or marriage, or from the relation of parent and child, when it is gained through the residence of others, it is acquired generally upon the basis of a settled personal residence, the permanency of which must be shown in a certain way specified by law. This being so, we cannot see why any

greater significance attaches to the payment of a county or State tax than to the payment of a poor or road tax, as these are levied upon the general valuations or assessments for county purposes upon all such subjects as are taxable for the purposes mentioned." That a settlement cannot be gained by residence and payment of taxes while a person is a public charge as a pauper, see *Sudbury v. Waltham*, 13 Mass. 461; *East Sudbury v. Sudbury*, 12 Pick. 1; *Oakham v. Sutton*, 13 Met. 192; *Brewster v. Dennis*, 21 Pick. 233; *West Newbury v. Bradford*, 3 Met. 428; *Taunton v. Middleborough*, 12 Met. 35; *Choate v. Rochester*, 13 Gray, 92; *Garland v. Dover*, 19 Me. 441; *Clinton v. York*, 26 Me. 167; *Norwich v. Saybrook*, 5 Conn. 384. As to the furnishing of supplies to a person as a pauper defeating his acquiring a settlement, see *Berkely v. Taunton*, 19 Pick. 480; *Green v. Buckfield*, 3 Greenl. (Me.) 136; *Hallowell v. Saco*, 5 Greenl. (Me.) 143; *Bangor v. Readfield*, 32 Me. 60; *Tremont v. Mt. Desert*, 36 Me. 390; *South Hampton v. Hampton Falls*, 11 N. H. 134.

raised in but one case in the United States. The Minnesota Supreme Court have discussed this question very fully, and sustained the constitutionality in this respect of the law of that State upon this subject. The court said:—"It [the statute] should not be so declared [to be unconstitutional] unless it was clearly beyond the power of the legislature to authorize removals under the conditions specified in the law. Its validity, giving lawful authority to county commissioners to the extent to which we have above indicated, may be sustained upon the ground that such power, resting probably upon grounds of general necessity and expediency, was sanctioned by statute before the adoption of our constitution, has ever since been acquiesced in, and that similar statutes have been in force since the early settlement of this country. It is a measure pertaining to the administration of public affairs, and concerning the reasonable necessity for which a considerable discretion must be allowed to the law-making department of the government, although of course subject to such constitutional limitations as under the circumstances shall be considered as clearly intended to be applicable to such cases."¹

¹ *Lovell v. Seebach* (1891), 45 Minn. 465; s. c., 48 N. W. Rep. 23, an action for kidnaping by a person removed under orders of county commissioners as a pauper. The court relied upon the opinion of Judge Cooley in a Michigan case as follows:—"If there existed before that instrument [the constitution] was adopted well known administrative proceedings, which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from any general language than we should to infer an intent to abridge the judicial authority by the use of similar words. . . . Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon

as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. . . . A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The party affected by them may always test their validity by a suit instituted for the purpose, and this is supposed to give him ample protection." *Weimer v. Bunbury*, 30 Mich. 201, 213. See, also, *State v. Allen*, 2 McCord, 55, where the court said:—"Any legal process which was originally founded in necessity, has been consecrated by time and approved and acquiesced in by universal consent, must be an exception to the right of trial by jury and is embraced in the alternative—the law of the land." See, also, *Murray v. Hoboken Land Co.*, 18 How. 272.

§ 953. Rulings on removal of paupers.— An order for the removal of a pauper from one township to another, providing only for her removal, but containing nothing to prevent her husband from accompanying her, cannot be said to violate the statute forbidding the separation of a wife from her husband.¹ A denial of the liability of a town for the support of a pauper by its overseer of the poor, when notified by the superintendent of the poor of a county that the pauper had removed to a town in that county and that he must provide for his support, need not follow the language of the statute.²

¹*Overseers of Poor v. Overseers* (Pa., 1892), 23 Atl. Rep. 1003. In *Inhabitants of Carver v. City of Taunton* (1890), 152 Mass. 484; s. c., 25 N. E. Rep. 965, it was held that a notice from a town to a city that it was giving aid to a mother and three children, and requesting their removal by the city, was not sufficiently explicit as to the children to require their removal, as it appeared that the mother had five children living with her in the town. The description should be such as to enable the town or city notified to avoid mistake and a liability to a suit for the commission of a wrong. *Walpole v. Hopkinton*, 4 Pick. 358; *Northfield v. Taunton*, 4 Met. 433; *Granville v. Southampton*, 138 Mass. 256, and *Lynn v. Newburyport*, 5 Allen, 545, are distinguished in *Carver v. Taunton*, *supra*. In *Houston Overseers v. Jay Overseers* (1890), 9 Pa. Co. Ct. Rep. 412, the expenses of removal of a pauper to the defendant township were adjudged against it, the court holding that it was a sufficient compliance with the poor-act on that subject if the overseers of the poor serve an order of removal by leaving a copy thereof with the clerk of an overseer of the accepting district, who afterwards delivers it to the overseer, and by removing the pauper into that district and leaving her

at a house of a resident therein, it being impracticable to deliver the body of the pauper to the overseers of the district. In *Madison Overseers v. Poor Directors* (1889), 9 Pa. Co. Ct. Rep. 435, where the overseers had succeeded in an appeal from an order of removal of paupers to their township, a question of costs arose under the provision of a Pennsylvania statute that the court "shall order to the party in whose behalf such appeal shall be determined, or to whom such notice did appear to have been given, such costs and charges as the said court shall consider reasonable and just." The court held that "costs and charges" did not include counsel fees or expenses of overseers in taking appeal, and hunting and procuring evidence. They were limited to those which a party would be entitled to in any other successful litigation and expenses of return of paupers.

²*Stillwell v. Coons* (1890), 122 N. Y. 242; s. c., 25 N. E. Rep. 316, where a denial of such liability was held sufficient to bring the case within the limitation of the statute in such cases, and that the action not having been brought within three months after receipt of the denial was barred. The receipt of the denial was a sufficient service upon the superintendent of the poor of the county. See, also, *Stillwell v. Kennedy*, 51 Hun, 114. In

§ 954. Notice in cases for removal of paupers.—A notice under the New York statute providing that, when a pauper strays or is removed from one municipality to another, the county superintendents of the poor shall give the overseers of the poor of the pauper's town notice of such improper removal, and require them to take charge of the pauper, which does not state that the pauper was a pauper while in the town from which he came, nor that his voluntary change of residence was improper, is insufficient.¹ The requirements of these statutes, which provide that if a pauper is brought into a county the superintendent may notify the overseer of the town from which the pauper was brought of the facts, and require his removal, and that the overseer to whom such notice is directed shall within thirty days either remove the pauper, or by "a written instrument" under his hand notify the superintendent from whom the notice was received that he denies its allegations as to notice and denial of liability, are sufficiently complied with when the superintendent of the poor of the county by written notice informs the overseer of the poor of the city that a pauper, naming him, was being supported by the county and that he claimed he was a resident of and chargeable to the city, and a reply of the overseer of the poor of the city acknowledging receipt of the notice and denying that the pauper had ever resided in the city or that the city was liable for his support.²

§ 955. Notice of charge by one town to another.—It was urged in a Vermont case that where a person was taking care

Coe v. Smith, 24 Wend. 341, it was held that the New York statute as to removal or enticement of paupers into a county was not to be construed to prevent a destitute person, or one who happens to be disabled while temporarily residing in one county, from returning to his friends in another.

¹ *McKay v. Welch* (1889), 6 N. Y. Supl. 358.

² *Stillwell v. Kennedy* (1889), 51 Hun, 114; s. c., 5 N. Y. Supl. 407. The notice and reply were sufficient as to

form and substance to enable the parties to the action to contest the question as to which was liable; and the statute being silent as to the mode in which the reply denying liability should be put into the possession of the person showing notice of claim, the reply here having come into his hands in due time, and he retaining, without objection, this service upon him, was sufficient to enable defendant to contest the question at issue. Statutes which deprive a person or municipality of the

of a pauper under a contract with the overseer of the poor of a town at so much per month until the termination of a lawsuit involving the question of whether this town or another was liable for the pauper's support, a notice by the overseer of the poor that the town would no longer pay for the support of this pauper and would make other arrangements if the contractor removed him from the town was sufficient to put an end to the contract, and that whatever claim the contractor had was by way of damages for breach of the contract. But the court held that the notice did not have that effect; that the town was bound to take away the pauper and provide otherwise for his support.¹ A notice of support furnished paupers, sent by the selectmen of one town in Connecticut to the selectmen of another town, which stated that the wife and six children of — (giving their names) "are in this town on expense and are inhabitants of your town, and we must look to your town for all legal charges for their support," has been held to sufficiently show that the persons named were paupers and in need of support, that they were then residing in the plaintiff town, and that the town had furnished them assistance.² The giving of the notice provided for in the code of Iowa, that "if the commissioners [of a county] find that the person committed to the hospital has, or probably has, a legal settlement in some other county, they shall immediately notify the auditor of such county of such finding and commitment, and the auditor so notified shall thereupon inquire and ascertain, if possible, whether the person in question has a legal settlement in that county, and shall immediately notify the superintendent of the hospital and the commissioners of the county of the inquiry," is a condition precedent to a right of recovery by suit for expenses paid for support of an insane person committed to the insane

right to contest in the courts alleged liabilities must be construed favorably to the person or corporation seeking to contest such liability.

¹ *Durfey v. Town of Worcester* (1891), 63 Vt. 418; s. c., 22 Atl. Rep. 609.

² *Town of Bethlehem v. Town of Watertown* (1883), 51 Conn. 490.

The Supreme Court of Connecticut said:—"Nothing technical is required in notices of this kind. They should be interpreted as plain, practical men understand them." See, also, *Hamden v. Bethany*, 43 Conn. 212; *Beacon Falls v. Seymour*, 44 Conn. 210.

hospital by a county of another in which it claims the person committed had a settlement.¹ A notice from one town to another which is required by the statute of Connecticut, giving the right to one town to an action to recover of another town for moneys expended in aid of a pauper having a settlement in the latter, describing the paupers as "A., colored, and wife and four children, aged from ten years down to an infant," has been held sufficient for parents and children.²

§ 956. What corporations are liable for support of paupers.—The county where a person resides when he falls sick or becomes insane or a pauper, even though his residence there is but temporary, is liable for his support primarily and until it can show that some other county is therewith legally chargeable, and is able to impose the burden of his support upon such county.³

¹ Poweshick County v. Cass County (1884), 63 Iowa, 244.

² Town of Windham v. Town of Lebanon, 51 Conn. 319. See, also, Washington v. Kent, 38 Conn. 249. In *Inhabitants of Granville v. Inhabitants of Southampton* (1885), 138 Mass. 256, a notice given by a town to another that "A. B. and family (wife and two children), whose legal settlement is in your town, but now residing in this town, being in needy circumstances," had applied for relief, etc., was held sufficient to indicate that it referred to the two children he had living with him, although he had two others away from him. *Shutesburg v. Oxford*, 16 Mass. 102; *Walpole v. Hopkinton*, 4 Pick. 358; *Lynn v. Newburyport*, 5 Allen, 545.

³ *County of Franklin v. County of Henry* (1887), 26 Ill. App. 193, in which the county of apparent residence of one who had been transferred from a penitentiary to an insane hospital, and from there, by mistake, to the poor-house of a county of which he was not a resi-

dent, was held liable in a suit by the latter county for his support. In *Clark County v. Huie*, 49 Ark. 145; s. c., 4 S. W. Rep. 452, it was held that a county could not be charged with the expenses of burial of one who, though he was admitted to be a resident of the county and in indigent circumstances, had never been adjudged a pauper by the county court. *Lee County v. Lackie*, 30 Ark. 764; *Prewett v. Mississippi County*, 38 Ark. 213; *Cantrell v. Clark County*, 47 Ark. 239. So under the statute in Washington Territory it was held, in *Collins v. King County*, 1 Wash. 416, and *King County v. Collins*, 1 Wash. 469, that there can be no recovery of a county for the keeping of paupers, where it is not shown that the governing authorities of the county had adjudicated such persons to be paupers and authorized the one seeking to enforce such liability to keep them as such. In *Mussel v. Tama County* (1887), 73 Iowa, 101; s. c., 34 N. W. Rep. 762, a certificate of the trustees of a township to the effect that a claim pre-

§ 957. **No implied liability.**—A town is not liable to a parent for the support of his idiotic or helpless child who is more than twenty-one years of age unless the overseers of the poor have made an express contract with him for such support at the town's expense.¹ While overseers of the poor of a town are responsible to the public for gross neglect of their official duty, no action can be maintained against a town upon their implied promise to do what it is their official duty to do.² To relieve a municipal corporation from its liability for the support of a child of tender years to one furnishing that support, in an action to recover pauper supplies furnished after notice, under the Maine statutes the removal, or offer of removal, of the child to the corporation almshouse must be the act of the board of overseers of the poor, and not the

presented to the supervisors of the county that the items of the account were necessary and proper for a pauper, temporarily in their township, disabled while there by breaking his leg, and that they were furnished by the claimant at their request, was held to be binding upon the county, and it could not be allowed, in the absence of fraud, to contradict it by the parol testimony of the trustees that the aid was not furnished at their request or on their order. The court said:—"Under the statute their [the trustees'] determination partakes of a judicial character, and settles the relations of the parties, in the absence of fraud."

¹ *Buxton v. Chesterfield* (1880), 60 N. H. 357. The Supreme Court said:—"Towns are liable for the support of paupers because the statute has imposed that duty upon them. There was no such liability at common law. The duty of discharging this obligation is devolved by statute upon the overseers of the poor, and it is only through their action that the town can be made liable to a person who furnishes relief to a pauper." It was urged

that the town was made liable for the support of this child by the statute, in which it is directed that, "Whenever, by reason of any infirmity of body or mind, it is fit and proper that children should remain in the family and under the control of a parent after they arrive at the age of twenty-one years, and such parent is unable to support such children without diminishing his estate, such children shall be supported by the town or county liable for their support, and the parent shall not be regarded or deemed a pauper by reason of the support so furnished to such idiotic or feeble adult child or children residing in his family and under his control." The court held that it was not the intention of the legislature in this enactment to impose any new liability on towns, either as to the class of persons to be assisted or as to the manner of rendering such assistance.

² *Mace v. Nottingham-West*, 1 N. H. 52; *Woodes v. Dennett*, 9 N. H. 55; *Mason v. Bristol*, 10 N. H. 36; *Otis v. Strafford*, 10 N. H. 352; *French v. Benton*, 44 N. H. 28.

individual, personal act of one member alone, unauthorized by the board.¹

§ 958. **Special liabilities.**—Charitable institutions in the State of New York to which children, under the age of sixteen, convicted as vagrants, truants or disorderly, under the provisions of the penal code of the State, are committed by the magistrates, are entitled to compensation from the county in which they may be convicted.² *

¹ *Carter v. City of Augusta* (Me., 1892), 24 Atl. Rep. 892. The court said:—"Overseers of the poor are required to determine and direct their action as a body. The action of one overseer is the action of the board when authorized by them; and, in many cases, when consistent with implied authority, although no express authority had been given, becomes the action of the board when approved or ratified." See, also, *Linneus v. Sidney*, 70 Me. 114; *Smithfield v. Waterville*, 64 Me. 412. The court distinguished *Lamson v. Newburyport*, 14 Allen, 80, and *Knight v. Fort Fairfield*, 70 Me. 500.

² *People v. Dickson* (1890), 10 N. Y. Supl. 604, awarding a peremptory writ of *mandamus* to the county treasurer to pay a bill in favor of a charitable institution which had been audited and allowed by the supervisors of the county. It was urged by the respondent, the county treasurer, that the commitments of the children were irregular. The court held that as to the validity of the commitments, that was a question which might be raised on *habeas corpus* between the children and the institution, but it was not available to the respondent as a reason why he should not pay the bill, which had been audited and allowed by the supervisors of the county. See *Osterhoudt v. Rigney*, 98 N. Y. 232. In *Town of New Hartford v. Town of*

Canaan (1884), 52 Conn. 158, it was held that, where any family is in want, they are "poor and unable to support themselves," within the statutes, although the head of the family earns enough for their partial support, and although their poverty is caused by intemperance or improvidence. The Supreme Court said:—"Our laws for the relief of the poor, whether considered in their letter or their spirit, take no cognizance of the origin and causes of poverty, but only of its existence." In *Fish v. Perkins* (1884), 52 Conn. 200, a man who was partially blind and nearly incapacitated for work, who occupied with his wife a basement of a small house, with an acre of ground, having a life interest in the land and basement, which interest was not worth over two hundred dollars, with no other property, was held entitled to help from the town, under the statute of Connecticut which provides for support by the town of "all persons who have not estate sufficient for their support." See, also, *Wallingford v. Southington*, 16 Conn. 435, where the judge said:—"We cannot think the law upon this subject is so rigid that if a poor man owns a miserable hovel, used as a shelter for himself and family, he must sell it, provided it is of any value whatever, before he can properly call on the selectmen to assist him in procuring medicine and bread for his sick and

§ 959. Various rulings as to the poor.— Officers of the poor are liable on the contracts of their predecessors made within the scope of their authority.¹ An overseer of the poor in an action upon a bond given in proceedings against one as a disorderly person in not supporting his wife and children, in which proceeding the defendant was “required to give security in the sum of \$250 to the town of O. to indemnify said town against his wife and children becoming in one year chargeable to the public,” and the bond given pursuant to the requirement contained an undertaking that the principal’s wife and children should not in one year become chargeable on the town, and “in case of a failure of such undertaking we . . . will pay to the town of O. the said sum of \$250,” can only recover such sum as had been paid out on account of the principal’s wife and children.² A justice of the peace, a tax-payer in a town which with two other towns had united in an association for a union poor-farm upon an agreement as to apportionment of expenses and a plan of settling any deficit there might be upon the basis of so much *per capita* for the paupers each town had had on the farm, was held not to be disqualified by reason of that fact in an action by one of the two towns against the other for the recovery of payments it had made on account of a pauper from this other town on account of a deficit.³

§ 960. Support of patient at State lunatic asylum — Persons “in need of immediate relief.”— Although the finding of county commissioners upon the question of a pauper’s set-

famishing children. Such a rule would be harsh and inconvenient.”

¹ *Hayes v. Simonds*, 9 Barb. 260. And county superintendents of the poor may contract so as to bind their successors in office for ordinary supplies, as well as for labor and services for the county poor-house. See, also, *Palmer v. Vandenberg*, 3 Wend. 193. In *Gere v. Supervisors of Cayuga*, 7 How. Pr. 255, it was held that an overseer of the poor, giving temporary relief, was not bound to

employ, in illness, the physician employed by county superintendents.

² *Breichelbeil v. Powlez* (1891), 15 N. Y. Supl. 465, the court holding the bond to be one of indemnity only.

³ *Town of Jericho v. Town of Underhill* (Vt., 1892), 24 Atl. Rep. 251, in which the court overruled the plea in abatement filed by the defendant town, holding that as each town was to pay for the expense of its own paupers, the town in which the justice resided was not interested in the suit.

tlement may be conclusive as a judgment until impeached or set aside, it may be set aside for fraud or mistake if justice requires it.¹ Where the statute of a State provides that a pay patient at a lunatic asylum may become a county patient upon an order of the county court to that effect, and a certificate from the clerk that such "patient . . . has not sufficient estate to support him at the asylum," it is not essential to the validity of an order of the county court that there should be an express finding that the patient has not sufficient estate to support him: this will be presumed.² A town which has furnished aid to a person as standing "in need of immediate relief," whose relatives, had they known it was applied for, were ready and willing and would have offered all the aid that was needed, which they had before afforded, cannot recover, under the Massachusetts statute relative to such cases, of the town of which that person had a settlement the amount expended; for the reason that a person may have no property, and yet if he is supported by relatives or friends would not be in need of immediate relief, within the meaning of the statute.³ An overseer's abandonment of an order of removal of a pauper from his township is a bar to another proceeding between the same parties for the removal of the same pauper, except for a subsequently acquired settlement.⁴

§ 961. The same subject continued.—In the absence of express statutory provisions there is no obligation or duty imposed upon towns to contribute to the support of persons residing within their limits.⁵ Liability for the support of indigent insane persons, not paupers, is placed by the statutes of

¹ *Concord v. Merrimack County* (1881), 60 N. H. 521. See, also, *Salisbury v. Merrimack County*, 59 N. H. 359; *Great Falls Mfg. Co. v. Worster*, 45 N. H. 110; *Judge of Probate v. Webster*, 46 N. H. 518; *Cheshire Prov. Inst. v. Stone*, 52 N. H. 365, 367.

² *State v. Cole County Court* (1883), 80 Mo. 80, in which the Supreme Court held that an order that a patient already in the asylum "became a county patient at the lunatic asylum from this date," without more,

bound the county for his support there.

³ *Inhabitants of Templeton v. Inhabitants of Winchendon* (1884), 138 Mass. 109.

⁴ *Cadwallader v. Dufham* (1884), 46 N. J. Law, 53. See, also, *Piscataway v. Perth Amboy*, 4 Harr. 173.

⁵ *People v. Board of Supervisors* (1890), 121 N. Y. 345, which held that a county which had paid the expenses in a lunatic asylum of indigent insane persons who had been sent there on

New York on counties, and not upon the towns.¹ The issuing of a writ of prohibition is the proper remedy, and properly issued when the board of supervisors of a county are attempting by action to collect the expenses paid for the support of indigent insane persons at an asylum from the towns where they had resided when sent to the asylum.²

§ 962. Support of insane poor further considered.—In Massachusetts a city, in order to recover the expenses paid by it for the support of a pauper committed to a State lunatic hospital from the town of the pauper's settlement, must first give the town notice thereof;³ and the amount recoverable in such case is limited to the expenses incurred by the city within three months next before such notice is given.⁴ The

the certificate of a county judge acting under Laws of N. Y. 1874, as amended in Laws of N. Y. 1880, ch. 164, could not recover of the town where the insane person resided.

¹ *People v. Board of Supervisors &c.* (1890), 121 N. Y. 345, reversing 49 Hun, 308, followed in *People v. Board of Supervisors &c.* (1890), 122 N. Y. 652; s. c., 25 N. E. Rep. 853. See, also, *People v. Supervisors of Genesee County*, 7 Hill, 171, approved in *Supervisors v. Morgan*, 4 Abb. Ct. App. Dec. 339. In this case Bronson, J., said, speaking of this class of patients:—"They are such as usually provide for themselves or are provided for by friends, and who only need assistance when sent to the asylum under the visitation of insanity. It is accordingly provided that they shall be admitted into the asylum and supported there at the expense of the county. As it is a new class of persons, the case does not come within the operation of any prior law, and there is nothing to relieve the county from the burden expressly laid upon it. . . ." *People v. Board of Supervisors*, 46 Hun, 354, was overruled in *People v. Board of Supervisors*, 121 N. Y. 345.

² *People v. Board of Supervisors* (1890), 121 N. Y. 345, reversing 49 Hun, 308. In *Board of Comm'rs v. Burkey* (1891), 1 Ind. App. 565; s. c., 27 N. E. Rep. 1108, it was held that the estate of a husband was not liable to reimburse a county for money expended by it in furnishing his insane wife with clothing while confined in the State hospital for the insane, nor for the expense of her inquest of insanity and for taking her to such hospital.

³ *City of Taunton v. Inhabitants of Wareham* (1891), 153 Mass. 192; s. c., 26 N. E. Rep. 451; Pub. Stat. Mass., ch. 84, §§ 14, 28, 29, as to remedies applied to Pub. Stat. Mass., ch. 87, § 34. It was intended by the legislature by these last statutes to give to towns paying such expenses of a lunatic the same rights and remedies against the place of his settlement as if the expenses had been incurred in the ordinary support of a pauper, and the same rules of law apply as if this had been a suit to recover the expenses of the ordinary support of a pauper. *Waltham v. Brookline*, 119 Mass. 479; *Worcester v. Milford*, 18 Pick. 379.

⁴ *City of Taunton v. Inhabitants of*

directors of the poor are entitled to be reimbursed out of the after-acquired estate of an insane criminal for his past maintenance in custody in a county or State lunatic asylum, under Pennsylvania statutes.¹

§ 963. Aid to children.—A father whose child is of weak mind, so that it is incapable of making choice of a residence or caring for itself, being as much bound to care for it after it attains the age of legal majority as before, cannot require aid in its support from a town as long as he has sufficient means himself.²

Wareham (1891), 153 Mass. 192; s. c., 26 N. E. Rep. 451. In *Amherst v. Shelburne*, 11 Gray, 107, it was held that notice from one town to another of a claim, made by the treasurer of a State lunatic hospital, for the past and future support of a pauper, was sufficient to support an action for the past expenses, though not actually paid until more than three months thereafter, but not for the expenses for the support of the pauper after such notice.

¹The court gave judgment on a case stated against the committee of the lunatic, but stated that the appropriate remedy would seem to be an application for an order. *Lancaster County Poor Directors v. Hartman* (1890), 9 Pa. Co. Ct. Rep. 177, the court further holding that pension-money paid to a pensioner or to his committee, where he is a lunatic (as in this case), and where such money can no longer be recalled by the pension department or its disposal be qualified or in any manner limited or abridged, it being no longer within the grasp of the government or its officers, inures wholly to his benefit under United States Revised Statutes, section 4747, and is subject to his disposal, and is liable to the payment of his debts, and in case of lunacy may, with the direc-

tion of the court, be applied to the payment of his debts and subsistence. *Lower Augusta Tp. v. Northumberland County*, 37 Pa. St. 143, where the Supreme Court say, under the act of 1845, when a lunatic is committed to the State lunatic hospital, the county is primarily liable to the hospital for the expense of maintenance, which the proper poor district must refund, the district to be reimbursed by the estate of relatives of the lunatic. *Keefer v. Schwartz*, 47 Pa. St. 509; *Wertz v. Blair County*, 66 Pa. St. 18.

²*Rowell v. Town of Vershire* (1890), 62 Vt. 405, holding a town not to be liable upon a contract, the town expressly promising aid to such a father, upon his application for it in support of his child, the promise being without consideration. As to incapacity of a weak-minded person to gain a settlement in his own right, see *Ryegate v. Wardsboro*, 30 Vt. 746; and taking the settlement of the father after coming of age, *Hardwick v. Pawlet*, 36 Vt. 320; *Topsham v. Chelsea*, 60 Vt. 219; *Landgrove v. Plymouth*, 52 Vt. 503; *Newbury v. Brunswick*, 2 Vt. 151; *Gilmanton v. Sanbornton*, 56 N. H. 336; *Croydon v. Sullivan*, 47 N. H. 179. In *Inhabitants of Liberty v. Inhabitants of Palermo* (1887), 79 Me. 473; s. c., 10

§ 964. Liability of corporations to those furnishing support to paupers.—The law raises an implied promise on the part of a township chargeable with the support of a pauper to furnish such support. And the township is liable for necessities furnished a poor person, with whose support it is chargeable, after due notice to the supervisor that such person is a township charge, and his refusal or neglect to furnish such support.¹

Atl. Rep. 455, it was held that pauper supplies furnished to a minor child will not be considered as supplies indirectly furnished the father when there is a destruction of the parental and filial relations and the father has deliberately abandoned such child and has taken up his residence in another town, emancipating the child from all duty to him and renouncing all obligation to it. Therefore, supplies furnished such a child, even with the knowledge of the father, will not be considered as supplies furnished to him to prevent his acquiring a settlement in his new place of residence. This is the principle declared in *Eastport v. Lubec*, 64 Me. 246; *Raymond v. Harrison*, 11 Me. 190; *Hallowell v. Saco*, 5 Me. 143; *Lowell v. Newport*, 66 Me. 87; *Munroe v. Jackson*, 55 Me. 59. As to liability of father to support his unemancipated children, see *Litchfield v. Londonderry*, 39 N. H. 247; *Hillsborough v. Deering*, 4 N. H. 86; *Dover v. Murphy*, 4 N. H. 161; *Poplin v. Hawke*, 8 N. H. 305. And in *Gleason v. City of Boston* (1887), 144 Mass. 25; s. c., 10 N. E. Rep. 476, it was held that as a married woman whose husband is living is neither at common law nor by the statutes of Massachusetts under legal obligation to support their children, even if the husband is imprisoned for crime, her right to acquire a settlement under the statutes of that State by a residence of five years is not

taken away by her receiving money during the five years to be used for the board of her pauper child.

¹ *Eckman v. Township of Brady* (1890), 81 Mich. 70, in which action it was further ruled that nowhere in the statutes of Michigan relating to the support of the poor by townships is the amount to be expended for any one person limited, or is at all placed in the discretion of the supervisor, or any other township officer, to determine who is a poor person, or the amount to be expended on behalf of such person. In this case it was determined that the commencement of the suit by a person who was receiving a sum fixed for the support of a poor person, by the supervisor, to recover a greater sum, was notice that the amount so received was deemed insufficient. The court approved the charge of the court below, that:—"The public authorities owe a duty to the pauper or to the poor person within its boundaries that is plain and undisguised. It is not the policy of the law, and it would be contrary to the humanity of the times, to permit any poor person to actually suffer in a township where there was plenty and wealth; and so it is that the law is express and explicit that the support shall be adequate and sufficient to meet the needs of the person who is a charge upon the township." In *Tufts v. Town of Chester* (1890), 62 Vt. 353, in a suit by a daughter for

§ 965. **The same subject continued.**—A head of a family who owns land with improvements which he values at a sum over and above the incumbrances upon it is not a "poor person" for whose support, under the Wisconsin statute which provides that "if any poor person shall become a charge to any town, having no settlement therein, the town in which he may have a legal settlement shall be liable for his support," the town in which he had a legal settlement is liable.¹ One who has bought a house and lot in a town, and supported his family there for a time before he became indigent, is not

the support of her mother, it was held that her testimony that for a long time she had cared for her mother for nothing; that in 1882 she sent her father to the overseer of the poor with word that if she continued to do so she must be paid; that, later the same year, she had a conversation with the overseer, in the course of which he said that the town "was willing" to pay her, was evidence of a contract sufficient to sustain the verdict against the town. An implied promise may be raised against a town the same as against an individual. There need be no special request to raise it. The request may be implied from the circumstances. See *Worcester v. Ballard*, 38 Vt. 60. In *Waltham v. Town of Mullally* (1889), 27 Neb. 483, it was held that a contractor under a contract to care for paupers, made with the supervisors of a township, who are the officers charged by law with the duty of caring for and contracting for the support and maintenance of the poor, furnishing such support and maintenance in good faith, according to the terms of the contract, could hold the township liable and legally bound therefor; and that such liability could not be avoided by refusing or neglecting to vote and levy the necessary taxes for its payment.

¹ *Town of Rhine v. City of Sheboygan* (Wis., 1892), 52 N. W. Rep. 444. "Poor," in the statute, has a restricted and technical meaning, and it is practically synonymous with "destitute," denoting extreme want and helplessness. *Anderson's Law Dict.*, "Poor." In *Board of Comm'rs v. Brown* (Ind., 1892), 30 N. E. Rep. 925, the court sustained a verdict in favor of one who had cared for a pauper resident of the county who had been injured on a railroad and brought to his house, and who, it was shown, had, after frequent conferences with the town trustee on the subject, been told by him generally to care for the pauper and the county would pay for it. And that after such a contract the fact that the pauper was a brother of the plaintiff would not affect the county's liability for the services rendered him; nor did it matter that the pauper was found injured in another county and removed to the one sued, as he was a resident of the latter. *State v. Osawkee*, 14 Kan. 421, 422. Until the man and wife who had received aid in the case cited below had exhausted their resources, they could not be considered as poor persons within the meaning of the statute for the relief of the poor. *Stewart v. Sherman*, 4 Conn. 553; *Wallingford v. Southington*, 16 Conn. 435; *Peters v. Litchfield*, 34 Conn. 264.

a "transient pauper" within the statute of Vermont, which applies only to the support of such a person as "is suddenly taken sick or lame, or is otherwise disabled and confined at any house, in any town, or is committed to jail and is in need of relief," for whose support such town can recover of the town whence he came.¹

§ 966. **Duty to furnish immediate relief.**—A statute provided that "when a person not an inhabitant of the town in which he resides shall become poor and unable to support himself, the selectmen of such town shall furnish him with necessary support as soon as his condition shall come to their knowledge, and each selectman neglecting such duty shall forfeit" a penalty. The plaintiff was requested, by a selectman to whom he had given notice that a person temporarily in that town was in want, to furnish necessities, for which the town would pay him. In holding the town liable the court said:—"This statute, framed in the interest of humanity, is intended to make provision for the poor so complete that if a man is overtaken by want when he is absent from home, and the fact comes to the knowledge of any of the selectmen of the town in which he happens to be, there instantly springs up the duty to give him food if he is hungry, or medicine if he is sick. In this particular matter this section of the statute does not intend to give time for investigation as to where his legal settlement may be before action; nor does it allow of the operation of that rule of law which determines that when power is given to two or more selectmen for public purposes, and especially for purposes of a judicial character, it shall, when all have been legally notified, be executed by a majority and not by one of them. This necessary assistance is not a matter of discretion, and is not dependent upon the result of consultation; the mandate seems to be to each selectman; and it requires action as soon as there is knowledge. The intent to furnish immediate relief

¹Town of New Haven v. Town of Middlebury (1891), 63 Vt. 399; s. c., 21 Atl. Rep. 608. This was the result of what is known as the Poland Pauper Law (Acts Vt. 1886, No. 42), which so amended R. L. Vt. 2814, that it was the duty of every town to *relieve and support poor and indigent persons residing therein*, the court holding that the person supported, from the facts stated in the text, *resided* in the plaintiff town.

is the marked characteristic of the section, and we should nullify its whole purpose if we determined that it imposes no duty upon and requires no action from one until notice has been given to all.”¹

§ 967. Proceedings to compel relatives to support paupers.

A New York statute makes it the duty of persons having sufficient means to maintain their relatives within prescribed degrees who are unable to maintain themselves; and provides that, if such relatives of a poor person fail in such duty, the poor of the town where such poor person is, or the superintendent of the poor in certain counties, may apply to the court of sessions of the county where the relatives dwell, on a notice prescribed, for an order to compel such relief; that after acquiring jurisdiction of such relatives, and having heard the allegations and proofs, the court may make an order directing the relatives to furnish such maintenance, specifying the sum to be paid for a certain period, or until the further order of the court; and the court may, from time to time, vary such order as the circumstances may require. In a proceeding to compel the maintenance of a pauper mother by her children, the court held that the order made by the court might be set aside, “so far as it limited the place of support to be at the alms or county poor-house.” Under this statute the court of sessions has no power to prescribe the place where such poor person shall be supported, nor the conditions of such support, except that it shall be by the approval of the superintendent of the poor.²

¹ *Welton v. Town of Wolcott*, 45 Conn, 329.

² *Weaver v. Benjamin* (1892), 18 N. Y. Supl. 630. In *Duel v. Lamb*, 1 Thomp. & C. 66-69, the court sustained the text and added: —“Whatever power there is over that support is vested in the overseers or superintendents of the poor; the sessions can only declare the duty to support, and, in default, to fix the sum to be paid.” It was held in this last case that where an order is made requir-

ing a relative of a pauper to support him, and fixing a sum to be paid weekly, the relative may provide for the support of the pauper at such place, and in such manner, as he may deem proper, provided the place and manner are approved by the overseer; and it is not until he has neglected or refused to do this that he is liable for the sum directed to be paid. Following *Converse v. McArthur*, 17 Barb. 410.

§ 968. Liability of a pauper for his support.—It seems that under the Pennsylvania statute which declares that “it shall be lawful for the directors of the poor of any county, and for the overseers of any district, as the case may be, in which any person shall become chargeable, to sue for and recover any real and personal estate belonging to such person, and to sell or otherwise dispose of the personal property, and to collect and receive the rents and profits of the real estate, and to apply the proceeds, or so much thereof as may be necessary, to defray the expenses incurred in the support and funeral of such person; and if any balance shall remain, the same shall be paid over to the legal representatives of such person after his death, upon demand made and security being given to indemnify such directors or overseers from the claims of all other persons,” a person who ceases to be a charge upon a poor-district by reason of after-acquired property is liable for previous maintenance.¹

§ 969. Municipality cannot recover for voluntary aid.—A person who receives aid from the officers of the poor of a city without having made application therefor, or representations as to his responsibility or physical condition, is not liable for the amount expended by the city in his support.² An

¹ *Lancaster County v. Directors of Hartman* (1890), 9 Pa. Co. Ct. Rep. 177. See, also, *Jester v. Overseers*, 11 Pa. St. 540, where, in an ejectment suit, the plaintiff before the trial of his cause became a pauper, and upon his death the overseers of the poor of the township were substituted as plaintiffs and the cause proceeded in their name. *White Deer Tp. Poor Overseers' Appeal*, 95 Pa. St. 191, where it was held that the act of 1836 did not divest the pauper of all rights in or to his property. It merely gives the overseers of the poor an authority over his property, which, when exercised, is superior to his. *Mumma's Appeal*, 127 Pa. St. 474.

² *City of Albany v. McNamara* (1889), 117 N. Y. 168; s. c., 22 N. E.

Rep. 931, in which the corporation sought to recover of defendant's testatrix money paid for the support of testatrix at a hospital, under an order made by the overseer of the poor directing the hospital to extend aid to her. The court summed up the reason for its ruling as follows:—“The question of propriety of relief is confided to the discretion of the poor authorities, and if they grant the relief asked for, it is presumed they have made such investigations as they deem necessary, and have determined the question as to the rights of the party examined to such relief. There is no provision made in the law for a review of that determination, and such aid once furnished must therefore be regarded as

institution organized for the avowed purpose of treating or administering charity, unless specially authorized by its charter to do so, cannot contract to bestow what purports to be a benefaction for a price, or to dispense charity for pay.¹

§ 970. Actions for support of paupers.—If a township trustee in relieving a poor person having a settlement elsewhere acts in good faith, the county of the settlement cannot escape liability on the ground that the person relieved had

a charity extended by the city to the object of their benevolence without expectation of reimbursement." *Deer Isle v. Eaton*, 12 Mass. 320; *Medford v. Learned*, 16 Mass. 215. The court held that in this action no request for support would be implied from the presumption that the officers of the poor performed their legal duty, and investigated and afforded aid, as the duty is discretionary, and the request is a fact in issue; also, that in the absence of evidence that some one had authority to make application and representations for defendants' testatrix, and of the nature of the representations, no presumption arose that application was made for her merely because it was usually made; also, that the duty of the officers of the poor being discretionary, they will be presumed to have found defendants' testatrix in need of aid, and furnished it gratuitously, in the absence of evidence showing a promise to pay therefor; and that though money was paid for the support of defendants' testatrix under a mistake of fact, no right of action arose in the absence of a request.

¹*Board of Comm'rs v. Ristine* (1890), 124 Ind. 242, holding upon the principle of the text that there could be no recovery of the administrator of a deceased person of unsound mind by the county on a contract made with the guardian of the deceased for board and care of him in

the county asylum for the poor, by the board of commissioners. Nor could there be a recovery on a *quantum meruit*, as a person who is admitted into a county asylum, organized for the support of the poor, cannot be charged therefor either on an express or implied contract. *Board v. Hildebrand*, 1 Ind. 555; *Board v. Schmoke* 51 Ind. 416. The doctrine announced in *Board v. Hildebrand*, *supra*, was, "that county commissioners had no power to convert an institution that was intended as a public charity into a boarding-house for such as wished accommodation for themselves or for their relatives for pay." *Ramsey v. Ramsey*, 121 Ind. 215, 222; *St. Joseph's Orphan Society v. Wolpert*, 80 Ky. 86; two judges dissenting, however, and cited as out of line with these Indiana decisions, *Howard v. Trustees*, 10 Ohio, 365; *Trustees v. Demott*, 13 Ohio, 104; *Inhabitants &c. v. Turner*, 14 Mass. 227; *Jasper County v. Osborn*, 59 Iowa, 208; *Inhabitants &c. v. Stratton*, 128 Mass. 137; *City of Bangor v. Inhabitants &c.*, 71 Me. 535; *Town of Dakota v. Town of Winneconne*, 55 Wis. 522; *Directors &c. v. Manlay*, 64 Pa. St. 18; 2 Kent, 148; *Turner v. Hadden*, 62 Barb. 480; *Wertz v. Blair County*, 66 Pa. St. 18; *Comm'rs &c. v. Directors, &c.*, 7 Ohio St. 65; *Goodale v. Lawrence*, 88 N. Y. 513; *Inhabitants v. Lyons*, 131 Mass. 323.

some property.¹ The cause of action under the Massachusetts statute providing that the expenses incurred in the relief of a pauper within three months next before notice given to the place to be charged may be recovered of such place by the

¹ *Hardin County v. Wright County*, 67 Iowa, 127. The court said:—"The duty of township trustees when applied to for poor relief is not to be determined by very rigid rules. They must in the exercise of a wise discretion grant relief where they judge that humanity requires it. They must, too, oftentimes act promptly and without taking time to make an extensive examination of the applicant's circumstances." *Poplin v. Hawke*, 8 N. H. 305; *Taunton v. Westport*, 12 Mass. 355; *Armstrong v. Tama County*, 34 Iowa, 309. In *Town of Winchester v. Cheshire County* (1886), 64 N. H. 100; s. c., 5 Atl. Rep. 767, it was held that the fact that a county pauper refused to comply with an order of the board of county commissioners that she be removed to the county almshouse, and that she thereafter supported herself for several months, did not deprive her of the right to county aid after she became wholly dependent, and physically unable to be removed, and the county was liable to a township which thereafter supported her, though the statute provided that no town shall be entitled to any compensation for the support of a county pauper after notice and neglect to comply with an order of the county commissioners that the pauper be removed to the county almshouse. In *Bellows v. Courter* (1889), 6 N. Y. Supl. 71, it was held that the amendment (Laws N. Y. 1885, ch. 546) to 1 Revised Statutes of New York, pages 628, 629, sections 58-62, making it a misdemeanor to remove or entice any poor person

from any city, town or county, without legal authority, to any other city, town or county, with intent to make the latter chargeable with his support, and provide for the return of such pauper to and his support by the town or county from which he had been removed, with indemnity to the other county or town for its expenses incurred in the pauper's support and return, applying the above sections to "any pauper . . . who shall of his own accord come or stray from any city, town or county into any other city, town or county not legally chargeable with his support," did not give a right of action for the support of a pauper by a county into which he had voluntarily removed, at a time when he was not a pauper, against the county from which he had so removed. In *Park County v. Jefferson County* (1889), 12 Colo. 585; s. c., 21 Pac. Rep. 912, it was held that the two provisions embraced in the statutes of Colorado, one that claims against a county may be presented to the board of county commissioners, and if disallowed, in whole or in part, the claimant may appeal to the district court; and the other concerning paupers, that if a pauper in certain cases requires and receives help from a county other than that of his settlement, "then the county taking charge of such pauper may sue for and recover from the county to which" such pauper belongs, "in any proper action before any court having competent jurisdiction, the amount expended," etc., were not antagonistic, and that a county may sue to recover the ex-

place incurring the same, in an action "to be instituted within two years after the cause of action arises, but not otherwise," arises at the time the notice is given, and this fixes the time from which the limitation of the suit begins to run.¹

§ 971. The same subject continued.—The court in the case cited in the note sustained the dismissal of the suit brought to restrain a levy to pay a warrant drawn in favor of the overseer of the poor for disbursements made by him on the ground that they were illegal expenditures under the taxpayers' act.² The New York statute which provides in one

pense of caring for a pauper, notwithstanding it has previously filed a claim therefor with the commissioners of the county of his settlement and taken no appeal from the order disallowing it. *Murphy v. Comm'rs*, 14 Minn. 69; *County of Grundy v. Hughes*, 8 Ill. App. 41. In *Kirk v. Brazos County* (1889), 73 Tex. 56; s. c., 11 S. W. Rep. 143, an action by one with a contract for taking care of and boarding "the blind and helpless paupers" of the county, and "all other paupers" at the poor-farm, against the county for the board of paupers who had received partial assistance from the county, but had never been at the poor-farm, it was held that the county was entitled to show by parol evidence that the words "other paupers" included only such as were supported at the poor-farm, and also the past course of the county as to such paupers, if notorious; also that the county could show that plaintiff had a contract of the same character the previous year, and had not charged for paupers partially supported outside of the poor-farm, to show the intent and understanding of the parties in making the second contract.

¹ *Inhabitants of Reading v. City of Malden* (1886), 141 Mass. 580; *Attleborough v. Mansfield*, 15 Pick. 19;

Townsend v. Billerica, 10 Mass. 411; *Hollowell v. Harwich*, 14 Mass. 186; *Uxbridge v. Seekonk*, 10 Pick. 150.

² *Cobb v. Ramsdell* (1891), 14 N. Y. Supl. 93. The overseer had in a number of cases, in good faith and in ignorance of a statute which required that he first obtain an order from a justice of the peace allowing the same, expended more than ten dollars for the relief of the poor. The town auditors had audited and allowed his claim for such expenditures, and at the annual town meeting it was voted that the tax levy be made to pay it. The town auditors were also in ignorance of this requirement of the statute, and supposed that they were acting within their power. The court in holding the payment of the order for the expenditures enforceable said:—"It is entirely clear that no fraud was intended or practiced by the overseer of the poor or any other officer of the town. The formality of getting a certificate of the justice of the peace or the superintendent of the poor for expenditures of more than ten dollars was omitted for want of knowledge of the existence of the statute requiring it, but nothing was paid or allowed which had not been honestly expended for the benefit of the poor. The omission to obtain

place that penalties under the excise laws shall be recovered by the town overseers of the poor, and in another that if the overseers "shall, for the period of ten days after complaint to them that any person has incurred such penalty, . . . neglect or refuse to prosecute for such penalty, any other person may prosecute therefor in the name of the overseers," was held to authorize a prosecution of such a suit by the relator in the name of the successor in office of a sole overseer of the poor in a town who neglected to prosecute during his term, which expired more than ten days after the complaint was made, without again making a complaint.²

a certificate resulted in no practical wrong, or the infliction of any pecuniary damage or injury. The taxpayers' act was not intended to include cases of inadvertence or mistake which resulted in no damage."

²Root v. Alexander (1892), 18 N. Y. Supl. 632. The court said:—"The overseer of the poor is a *quasi-municipal* corporation, having perpetual succession. The incumbency of the office changes but the office remains the same. All rights acquired by others under one incumbency of the office continue under those which succeed." In Wood v. Simmons (1889), 51 Hun, 325; s. c., 4 N. Y. Supl. 368, the court construed the following statutes, one providing that no person shall be removed as a pauper from any city or town to any other city or town of the same or any other county, or from any county to any other county, and others providing that any pauper who shall of his own accord come from one city, town or county into any other city, town or county not legally chargeable with his support, shall be maintained by the superintendent of the county where he may be; and that by taking certain proceedings the liability of the county or town from whence he came for his support may be fixed,

if such county is so liable. It was held that one who had always been able to support himself and family by manual labor, though the wages earned by him were not more than sufficient for that purpose, was not a pauper within the meaning of the statute; and where, having been a resident of the city and county of New York, he went to another county and there met with an accident which rendered him unable to support himself, the county whence he came was not liable for his support. In Board of Supervisors v. City of Kingston (1888), 50 Hun, 435; s. c., 3 N. Y. Supl. 221, the city which was the residence before his conviction of one who was convicted in another county of crime and sent to the penitentiary and thence to a lunatic asylum and his expenses therein paid by this county was held liable to the county in its suit under Laws of New York, 1874, chapter 446, title 1, article 2, section 32, for the sum expended in that way. It was claimed that the county in which the city was situate was liable; but this contention of the city was overruled, as the city by law was constituted a separate poor district. The city further claimed that the commissioners of the almshouse of the city were responsible. This too was overruled, as

§ 972. Statutes prohibiting bringing paupers from other States.—The Michigan statute provides that “Any person who shall bring or remove, or cause to be brought or removed, any poor or indigent person from any place without this State into any county within it, with intent to make such county chargeable with the support of such pauper, shall forfeit and pay fifty dollars, to be recovered before any justice of the peace of the county into which such pauper shall be brought or in which the offender may be, and shall also be obliged to convey such pauper out of the State, or support him at his own expense.” It was held that a suit to recover for the support of a pauper illegally brought from another State into a county of Michigan should be brought in the name of the superintendents of the poor of the county.¹ But such a suit will not lie until after the pauper is adjudicated such, nor until expenses for such support have been paid, or the liability therefor incurred by the superintendents.² And an order of a court of the State from which the pauper was removed, under a statute of that State for the removal of the pauper who had not gained a legal settlement therein to her former place of residence in Michigan, could not be pleaded as a justification to the person who executes it, where the removal is in violation of the statutes of Michigan.³ But a conviction for a violation of the statute must precede a suit to recover the forfeiture provided for therein, and until the person bringing the pauper into the State is so convicted and required to indemnify the county against liability for the pauper’s support in case he fails to remove the pauper from the State, he is under no obligation to give the bond, nor will

these commissioners only had under the statute the care and management of the poor of the city, and the responsibility and liability and duty to raise money to support the poor of the city rested finally upon the municipal corporation and not upon these commissioners of the almshouse of the city. In *Goodale v. Brocknor*, 61 How. Pr. 451, it was held that though a husband, whose wife while insane leaves him is liable at common law to any one

supplying her with necessities or maintaining her, this not being a desertion of him, yet an action on such common-law liability could not be maintained by a superintendent of the poor.

¹ *Superintendents of Poor v. Nelson* (1889), 75 Mich. 154; s. c., 42 N. W. Rep. 797.

² Case cited in the preceding note.

³ *Superintendents of Poor v. Nelson*, 75 Mich. 154.

a suit lie against him for such non-removal.¹ Upon an indictment for a violation of the New Hampshire statute which provides, in substance, that if any person shall bring from another State and leave in any town in this State a poor and indigent person having no settlement therein, and having no visible means of support, knowing such person to be poor and indigent, with the intent to charge such town with the support of such poor person, he shall be punished by fine and imprisonment, a defendant could not show, as bearing upon the question of criminal intent, that she investigated the matter in connection with the statute of Massachusetts, and became satisfied that the indigent person was entitled to a settlement within the State of New Hampshire.²

§ 973. Liability to paupers for negligence of employees. A town has been held liable in an action of tort for negligence of an employee at its almshouse, as it appeared that the overseers of the poor, highway surveyors and selectmen of the town were the same persons, and they used its almshouse farm partly for the support of its poor, partly for the maintenance of its highway department, and incidentally for the production of income.³ A physician employed by a city to

¹ Case cited in the preceding note.

² *State v. Cornish* (N. H., 1890), 21 Atl. Rep. 180. This statute comes within the class where the offense needs no criminal intent to constitute it a crime, but the offense is a crime by reason of its being prohibited. When the defendant brought this indigent person into the State, she assumed the peril of not knowing the facts as well as the law. *Goshen v. Hillsborough*, 45 N. H. 139, distinguished as being decided on the authority of *Deerfield v. Delano*, 1 Pick. 469, and *Greenfield v. Cushman*, 16 Mass. 393, which had been essentially overruled in Massachusetts.

³ *Neff v. Inhabitants of Wellesley* (1889), 148 Mass. 487; s. cr., 20 N. E. Rep. 111. It was also held that their use of the farm was not illegal, so as

to exonerate the town from liability on account of it. The court said:—"A city or town may make any reasonable provision for the support of paupers, or for sustaining other public burdens imposed upon it, and for that purpose may manage a farm which produces more crops than are needed for the food of the paupers, and may sell or exchange the surplus. It may transact business outside of the authority expressly given it, if the business is incidental to the performance of its public duties." The reason for a departure from the general rule of non-liability of towns in such actions as given in *Hill v. Boston*, 122 Mass. 344, and *Tindley v. Salem*, 137 Mass. 171, 172, was that the use of the town's property by its agents in part for profit brought it

treat patients at the city almshouse is liable to one of such patients who is injured through his negligence, though there is no contractual relation between the patient and the physician.¹

§ 974. **Support of the insane.**—The Nebraska statute in the chapter entitled “Paupers” which provides that the persons named shall be supported by their relatives designated in the act has no reference to the support and care of insane persons confined in the insane hospital at public charge.² There is no liability at common law or by statute against the children of insane persons for the maintenance of such persons in a State hospital for the insane.³

§ 975. **The same subject continued.**—Under the New Hampshire statute which provides that any insane person

within the rule in *Oliver v. Worcester*, 102 Mass. 489; *Worden v. New Bedford*, 131 Mass. 23.

¹ *Du Bois v. Decker*, 130 N. Y. 325; s. c., 29 N. E. Rep. 313, affirming 4 N. Y. Supl. 768. The court said:—“The fact that he [the physician] was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill.”

² *County of Richardson v. Truenbach* (1888), 24 Neb. 596, in which it was held that the brothers and sisters of an insane person were not liable for the expenses of his treatment in the insane hospital during such insanity, under Compiled Statutes of Nebraska, 1887, chapter 40. As to the distinction in the State's taking charge of the insane and the adjudication of matters of paupers, see *County of Delaware v. McDonald*, 46 Iowa, 171; *Monroe County v. Teller*, 51 Iowa, 670, holding a father not liable for the support of his insane son; *Speedling v. Worth County*, 68 Iowa, 152, in which a father recovered of the county the value of his services in caring for his daughter found to be insane by the commissioners of insanity.

³ So held in a Nebraska case. *Richardson County v. Smith*, 25 Neb. 767; s. c., 41 N. W. Rep. 774; *Walker's Am. Law*, § 109; *Browne on Dom. Rel.* 82; 2 *Kent's Com.* (13th ed.) 208; *Chase's Blackstone*, 168; *Schouler's Dom. Rel.*, § 265; *Edwards v. Davis*, 16 Johns. 282. In *City of Newburyport v. Creedon* (1889), 148 Mass. 158; s. c., 19 N. E. Rep. 341, in an action brought by a city to recover of defendant the money it had paid for his support in a county retreat for the insane, under Public Statutes of Massachusetts, 1882, chapter 113, it was held that the city should show that some action of the county commissioners had been taken to direct the sum to be allowed and paid per week for such person's support, as that is required by Public Statutes of Massachusetts, chapter 87, section 49; and that it was not so erroneous as to require a reversal that the trial judge was not satisfied upon that point by evidence of the city treasurer that a certain amount per week for each had been paid by the city for several years.

committed to the asylum shall be supported by the county from which he is committed, and that such county shall be entitled to recover the amount so paid of any town, county or individual by law liable for his support, the liability of a town for the support of persons who have acquired a settlement therein is not absolute, but embraces only those who subsequently become destitute and unable to support themselves.¹ Under the Ohio statute which authorizes the sequestration of the property of one who, whether sane or insane, "is admitted into the [county] infirmary as a pauper," the property of a person who has been adjudged insane by the proper court, and committed to the State asylum for the insane, but removed to the county infirmary for the time, under the warrant of the judge of that court, and there kept at public expense, cannot be sequestered.²

¹ *Merrimack County v. City of Concord* (N. H., 1891), 23 Atl. Rep. 87, holding the action of the county against the city for the money paid by the court for the support of an insane person who had acquired a settlement in the city not maintainable, as it was not shown that this insane person was a pauper. In *People v. Board of Supervisors* (1887), 46 Hun, 354, the Supreme Court construed the New York statutes which provide that an indigent insane person confined in an asylum under order of a judge should be supported at the expense of the county in which he lived; and that when an indigent person not a pauper becomes insane, notice shall be given to the superintendent of the poor of the county chargeable with his support in an asylum, and that the supervisors shall raise the means for his support; and that the expense of sending any lunatic to a State asylum shall be borne by the county or town to which he may be chargeable. They held that, as to counties in which the distinction between town and county poor is maintained, the expense of supporting in-

digent insane persons, not paupers, is chargeable to the town in which they have legal settlement. It was also held that the contention of the town that it could not be charged with the cost of supporting such persons which was involved in this case, upon the ground that although they had a legal settlement in the town they had not previously to their being adjudged proper persons to be sent to the insane asylum become chargeable to it, could not be sustained, as under the law of 1874 no distinction was preserved between poverty caused by insanity and that caused by other disease or misfortune. See, however, § 961, n. 5, on p. 992, *supra*.

² *Brown v. Board of Infirmary Directors* (Ohio, 1892), 31 N. E. Rep. 744. This removal was unauthorized. The power of the probate judge, under Revised Statutes of Ohio, 707, 708, is to commit an adjudged lunatic to the infirmary only until he can be admitted to the State asylum, or, when not entitled to admission, such person is at large and dangerous. Besides, it is only the property of a pauper which can be sequestered.

§ 976. **Soldiers' homes.**—A Michigan statute providing for the establishment of a soldiers' home and creating a board vested with the duty of its management makes it the duty of such board to "prepare and carefully digest and mature a system of government for said home, embracing all such rules, regulations and general laws as they may deem necessary for preserving order, enforcing discipline and preserving the health" of the inmates. It is within the power of the board of managers to require the pension money of the inmates to be deposited, subject to the disposal of the board, if, in the words of the statute, they deem it necessary to preserve order, enforce discipline or preserve the health of the inmates. But there is no right conferred by the statute upon the board to determine what relatives are dependent upon the pensioner for support, and to direct how much of such money shall be sent to such relatives.¹

§ 977. **Reformatories.**—The Supreme Court of Minnesota sustained the action of the municipal court of a city in committing an infant, in consequence of incorrigibly vicious conduct, to the care and guardianship of the board of managers of the State reform school, the power of the municipal court in such matters being the same as that of justices of the peace under the statutes of the State, which confer upon justices of the peace power to commit infants, in consequence of incorrigibly vicious conduct, to the care and guardianship of the board of managers of the State reform school for terms exceeding a period of three months. They held this statute not repugnant to the provisions of the State constitution relating to the jurisdiction of justices of the peace in criminal matters.²

¹ *Loser v. Board of Managers* (Mich., 1892), 52 N. W. Rep. 956, holding that such a deposit is not an assignment or transfer of a pension within the meaning of the act of congress of February 28, 1883, which makes void any "pledge, mortgage, sale, assignment or transfer of any right, claim or interest in any pension."

² *State v. Brown* (Minn., 1892), 52 N. W. Rep. 935. The ruling was

based upon the rulings in *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328; *Farnham v. Pierce*, 141 Mass. 203; s. c., 6 N. E. Rep. 830; *Prescott v. State*, 19 Ohio St. 184; *House of Refuge v. Ryan*, 37 Ohio St. 197; *Roth v. Home of Refuge*, 31 Md. 329; *Ex parte Crouse*, 4 Whart. 9; *In re Ferrier*, 103 Ill. 367; *McLean County v. Humphreys*, 104 Ill. 378; *Tiedeman on Limitations of Police*

Nor was it repugnant to the provisions of the constitution relating to jurisdiction of probate courts.¹ Nor is the mode of procedure pointed out in this legislation in violation of that portion of the fundamental law of the State which provides that the right of trial by jury shall remain inviolate.²

Power, ch. 13. In *Milwaukee Industrial School v. Supervisors*, *supra*, Judge Ryan expressed the views of the court as follows: — "And in the first place we cannot understand that the detention of the child at one of those schools should be considered as imprisonment any more than its detention in the poor-house — any more than the detention of any child at any boarding school, standing for the time *in loco parentis* to the child. Parental authority implies restraint, not imprisonment. And every school must necessarily exercise some measure of parental power of restraint over children committed to it. And when the State as *parens patriæ* is compelled by the misfortune of a child to assume for it parental duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the State delegates the nurture and education of the child. The State does not, indeed we might say could not, intrude this assumption of authority between parent and child standing in no need of it. It assumes it only upon the detention and necessity of the child arising from want or default of parents. And in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child no more than the tenderest parent exercising like power of restraint over children."

¹*State v. Brown* (Minn., 1892), 52 N. W. Rep. 935. Upon this point the court said: — "When committing an

infant to the care and custody of the board of managers of the reform school, the magistrate is not appointing a guardian for him, nor does such officer or the board of managers assume any control over his estate if he has one. A proceeding of this nature would not stand in the way of, nor would it be prevented by, the appointment of a statutory or testamentary guardian, — the only guardian coming within the purview of the constitution. It is no more a violation of the fundamental law for the magistrate to commit a child to the guardianship of the managers of an institution of this kind than it would be for a competent court to appoint a guardian *ad litem* for him. The language of the constitution does not apply where the State acts as the common guardian of the community, exercising its power whenever the welfare of an infant demands it, or where the State acts in the legitimate exercise of its police power. Therefore, the law-makers were not prohibited from conferring jurisdiction in such cases upon any of the judicial officers of the State."

²*State v. Brown* (Minn., 1892), 52 N. W. Rep. 935; *City of Mankato v. Arnold*, 36 Minn. 62; s. c., 30 N. W. Rep. 305. As to whether the natural or legal guardian should be a party to the proceeding, the court said: — "The statute does not seem to contemplate it, and it is possible that it is not necessary." See *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328; *Fitzgerald v. Commonwealth*, 5 Allen, 509.

§ 978. Liability of counties for the care of prisoners.— In Kansas the duty of keeping the county jail and supplying the prisoners committed thereto with board and lodging devolves upon the sheriff of the county by statute, and to him alone is a county liable for such supplies.¹ But a statute of that State provides that the board of county commissioners may allow a moderate compensation for medical services, fuel, bedding and menial attendance furnished for prisoners committed to the county jail, which shall be paid out of the county treasury. The Supreme Court of Kansas has held the allowance of claims for such services, supplies and attendance to be discretionary with the board, and that the liability of a county for them could only arise upon an order made by the county commissioners when duly convened and acting as a board.² The liability of a county for expenses connected with prisoners in its jail depends entirely upon the statute, it not being liable unless the statute has created the liability.³

§ 979. Care of prisoners continued.— Medical services to prisoners in jails are provided for by an Indiana statute which

¹ *Atchison County v. Tomlinson*, 9 Kan. 167.

² *Hendricks v. Board of Comm'rs* (1886), 35 Kan. 488; s. c., 11 Pac. Rep. 450, which held a demurrer to a petition to have been properly sustained which alleged that a prisoner was placed by the sheriff in charge of the plaintiff, with the knowledge and consent of the county commissioners, and that the supplies were furnished and the services rendered by the plaintiff at the request of the sheriff, and with the knowledge and consent and approval of the county commissioners, as not stating a cause of action. A county cannot be held liable because the services and supplies were furnished upon the request of the sheriff; nor by reason of the individual consent or action of the members of the county board. See *Roberts v. Comm'rs*, 10 Kan. 29.

³ *Kelly v. Multnomah County* (1890),

18 Oregon, 356; s. c., 22 Pac. Rep. 1110, in which the county was held to be liable for the cost of blankets furnished by the keeper to prisoners confined under criminal process in its jail, as the statutes made it the duty of the keeper to furnish and keep clean the necessary bedding and clothing for all such prisoners, and in another statute the charges and expenses for safe keeping and maintaining such prisoners were payable out of the treasury of the county. The Supreme Court held also that where those persons whose duty it is to execute a law have uniformly given it a particular construction and that construction has been acquiesced in and acted upon for a long time, it is a contemporary construction which always commands the attention of the courts and will be followed unless clearly and manifestly wrong.

constitutes certain officers a board of health *ex officio*, to be completed by the election of a physician as secretary, who, in the case of a county board of health, shall render such medical services as may be required by persons confined in the county jail. Though there may be a regularly elected secretary of a county board of health in accordance with this statute, still, where he is at such a distance from the jail that he could not be reached in time to save the life of a prisoner suddenly taken sick, the jailer may employ a physician at the expense of the county.¹ It has been held in New York that there was no power in the county of Queens to contract with the authorities of Kings county for the support of prisoners convicted in the former of crimes punishable in a State prison.² Where an inquest is necessary to ascertain the cause of a death, the coroner has authority to call in a physician to make an autopsy, and the county is liable for reasonable compensation therefor, under the Arkansas statute which provides that a coroner shall, when holding an inquest, inquire into the cause of death, and shall use "all proper means" and "all proper witnesses" to ascertain the truth.³

§ 980. Hiring of convicts.—Under the laws of Arkansas empowering county courts to hire out for labor county convicts in certain cases, it has been held that exercising the power to hire them to a contractor for another county's convicts, upon the representation of the hirer that he was such a contractor, and the county judge reciting in his order hiring the convict to him that he was, was a determination of that

¹ *Lamar v. Board of Comm'rs* (Ind., 1892), 30 N. E. Rep. 912.

² *Board of Charities &c. v. Board of Supervisors* (1892), 18 N. Y. Supl. 883, rendering a judgment for defendant on the case submitted. The court said:—"The contract must be held to be within the spirit of the law, which is to authorize Queens county to board its jail prisoners, who are sentenced to detention over sixty days, to be detained in a penitentiary where occupation will be furnished to the prisoner, and inci-

dentally to compel the prisoner to earn his own support."

³ *St. Francis County v. Cummings* (Ark., 1892), 18 S. W. Rep. 461. The court said:—"As a rule the counties are responsible for the expenses of the administration of the criminal laws. Both justice and policy demand an adherence to the rule in this case." See, also, *Allegheny County v. Watt*, 3 Pa. St. 462; *County of Northampton v. Innes*, 26 Pa. St. 156.

fact — a judgment of the county court which could not be collaterally attacked.¹ The Arkansas statutes, one of which authorizes the county court to contract for the safe keeping of persons committed to the county jail, and the other providing that “in case the county court is unable to make a contract with any person in the county, the court may contract for the work of its prisoners with the contractor of any other county,” have been construed to intend that the contractor should keep his prisoners in the county in which they were convicted, except when the state of affairs is such as is described in the last named statute. In that case a contractor for another county can work them where he has the others employed.² Under the Tennessee statute which authorizes branch prisons, and permits the lessees of the penitentiary, with certain exceptions, to work the convicts at any place in Tennessee, subject to the rules prescribed by the act, a convict who is regularly sentenced to imprisonment and labor in the penitentiary, and who is worked in a coal mine by a lessee, and confined in a branch prison under the control of an assistant or deputy warden, as provided by the act, is not illegally confined and cannot be discharged on *habeas corpus*.³ A county would be entitled to recover for work and labor done by its convicts, let under an agreement with a private person, although there is no bond with sureties taken of the lessee, and the contract did not set out the kind of labor which they were to perform, all of which are statutory requirements in the leasing of convicts.⁴

¹ State v. Cross (Ark., 1892), 18 S. W. Rep. 170. See, also, *Ex parte* Jackson, 45 Ark. 158; *Ex parte* Brandon, 49 Ark. 143; s. c., 4 S. W. Rep. 453; *Ex parte* Barnett, 51 Ark. 115; s. c., 10 S. W. Rep. 492.

² State v. Cross (Ark., 1892), 18 S. W. Rep. 170, in which a contract with one who was not a contractor for another county was held to be void.

³ State v. Jack (Tenn., 1891), 18 S. W. Rep. 257.

⁴ Trammell v. Lee County (Ala., 1891), 10 So. Rep. 213, the court hold-

ing that all these provisions of the statute were intended only for the security of the county and the welfare of the convicts and their omission could not in anywise affect the hirer. Further, it was held that where the hirer had bound himself to pay for the full terms of their sentences, less the services lost to him by death, and there was no provision for abatement in case of escape; testimony that some of the convicts did escape was properly excluded in this action for their hire.

§ 981. **Liability for personal injuries to prisoners.**—A municipal corporation is not liable for personal injuries sustained by one prisoner at the hands of another confined in the same cell or room of the city prison, notwithstanding the police officer who arrested the injured man and put him in prison may have been guilty of wrong or negligence in confining him with an intoxicated fellow-prisoner, who was on that account violent and dangerous.¹

§ 982. **The same subject continued.**—In the absence of a statute imposing such liability a county is not liable in dam-

¹ *Wilson v. Mayor &c. of Macon* (Ga., 1892), 14 S. E. Rep. 710. See, also, *Cook v. City of Macon*, 54 Ga. 468; *Harris v. Atlanta*, 62 Ga. 290; *McElroy v. Albany*, 65 Ga. 387; *Attaway v. Cartersville*, 68 Ga. 740; 2 *Dillon on Munic. Corp.* (4th ed.), § 975; *Cooley, Torts*, *620 *et seq.*; *Shear. & Redfield on Negligence* (4th ed.), §§ 253, 260; 15 *Am. & Eng. Encyc. of Law*, 1141 *et seq.* In *Davis v. Mayor &c. of Knoxville* (Tenn., 1891), 18 S. W. Rep. 254, the rule as to liability for torts on the part of municipal corporations was given as follows:—"When such corporation exists by virtue of a charter, general or special, limiting its powers and prescribing its duties, it implicitly contracts to carry out the prescribed purposes of its creation; and if its agents or servants are guilty of negligence while in the discharge of corporate duties which are for the peculiar benefit of the corporation in its local or special interest, an action will lie against the municipality, the maxim of *respondet superior* applying." *Mayor v. Lasser*, 9 *Humph. (Tenn.)* 757; *Mayor v. Brown*, 9 *Heisk.* 6; *Memphis v. Kimbrough*, 12 *Heisk.* 133. "But in so far as purely governmental powers are concerned and in respect to the general administration of the general law of the State, and in respect to all duties which are essentially public, and not local and special, they are deemed to be agencies of the sovereign power and not subject to be sued for the torts of their agents or officers, unless by statute an action is given." See *Pesterfield v. Vickers*, 3 *Cold. (Tenn.)* 205; *Pollock v. Louisville*, 13 *Bush*, 221; s. c., 26 *Am. Rep.* 260; *Trammell v. Russellville*, 34 *Ark.* 105; *Dorgan v. Mobile*, 31 *Ala.* 469; *Richmond v. Long*, 17 *Gratt.* 375. In *Davis v. Mayor &c., supra*, the court held the city not liable for an assault upon one prisoner by a fellow-prisoner in the city jail, and thus spoke of its duty in respect to jails:—"The preservation of order, the maintenance of sobriety, the arrest and detention of violators of the general law of the State, is not for the local and private benefit of the corporation. It draws no private emolument from the enforcement of an ordinance carrying out the general policy of the State, and in the exercise of the powers incident to all these matters it is but an agency of the State and its officers; in effect, officers of the State. Its discretion as to the character of its jail cannot be controlled by judgments holding it liable for negligence, if in the opinion of a jury it is not sufficiently commodious or properly arranged."

ages for the failure of the board of commissioners to keep the county jail in a pure and inhabitable condition, though the board may be required by statute to build and keep the jail in repair.¹ "The ground upon which it is held that *quasi*-corporations, such as counties, towns, school districts and the like, are not liable for damages in actions of this character, is that they are involuntary territorial and political divisions of the State, created for governmental purposes, and that they give no assent to their creation, whereas municipal corpora-

¹ *Morris v. Board of Comm'rs* (Ind., 1892), 31 N. E. Rep. 77, an action for damages on account of impairment of health of one confined in the jail by reason of its bad condition. The court said:—"Counties and townships are created to give effect to and enable the citizens to exercise the right of local self-government. *State v. Denny*, 118 Ind. 449; s. c., 21 N. E. Rep. 274. Such subdivisions are instrumentalities of government, and execute authority delegated by the State, and act for the State. As the State is not liable for the acts or omissions of its officers, neither should a political subdivision of the State be liable for the acts or omissions of its officers as relating to political powers. Prisons are constructed and maintained as one of the instruments of and as a means for the purpose of carrying out the police power of the State, and the duty of constructing and maintaining them is imposed upon the counties by the State." The court in this case followed *White v. Board* (Ind.), 28 N. E. Rep. 846, in which case the court said:—"In caring for prisons a county exercises part of this great power by virtue of its delegation by the legislature." See, also, *Board v. Boswell* (Ind., 1892), 30 N. E. Rep. 534, holding the same doctrine; *Summers v. County of Daviess*, 103 Ind. 262; s. c., 2 N. E. Rep. 725, where it was held that counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioner in the selection of an unskilful physician for the poor; *Abbett v. Board*, 114 Ind. 61; s. c., 16 N. E. Rep. 127; *Park v. Board*, 3 Ind. App. 536; s. c., 30 N. E. Rep. 147; *Union Civil Tp. v. Berryman*, 28 N. E. Rep. 774; *Town of Laurel v. Blue*, 1 Ind. App. 128; s. c., 27 N. E. Rep. 301; *Cooley, Const. Lim.* 256, 257; 1 *Shear. & R. Neg.*, § 253; *Colwell v. City of Boone*, 51 Iowa, 687; s. c., 2 N. W. Rep. 614; *President &c. v. Schroeder*, 58 Ill. 353; *Hollenbeck v. Winnebago County*, 95 Ill. 148; *Pfefferle v. Comm'rs*, 39 Kan. 432; s. c., 18 Pac. Rep. 506; *Buttrick v. City of Lowell*, 1 Allen, 172; *Watkins v. County Court*, 30 West Va. 657; s. c., 5 S. E. Rep. 654; *Maximilian v. Mayor &c.*, 62 N. Y. 160; *Manuel v. Comm'rs*, 98 N. C. 9; s. c., 3 S. E. Rep. 829. In *Lindley v. Polk County* (Iowa, 1892), 50 N. W. Rep. 975, it was held that a person confined in the jail of the county could not recover from the county for injuries to his health by failure of the board of supervisors to keep the jail in a healthy condition.

tions proper are either specially chartered, or voluntarily organized under general acts of the legislature." ¹

¹ *Kincaid v. Hardin County*, 53 Iowa, 430; s. c., 5 N. W. Rep. 589. See as to same principle, *Comm'rs v. Mighels*, 7 Ohio St. 109; *Eastman v. Meredith*, 36 N. H. 284. In *Bigelow v. Randolph*, 14 Gray, 541, the court said:—"It [this rule] is applied in the case of towns, only to the neglect of or omission of a town to perform those duties which are imposed upon all towns without their corporate assent, and exclusively for public purposes, and not to the neglect of those obligations which a town incurs when a special duty is imposed upon it with its consent, expressed or implied, or a special authority is conferred on it at its request." *Green v. Harrison County*, 61 Iowa, 311; s. c., 16 N. W. Rep. 136.

CHAPTER XXV.

PUBLIC HEALTH—BOARDS OF HEALTH, AND QUARANTINE.

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| <p>§ 983. Municipal regulations for the promotion of public health.</p> <p>984. Power of the State legislature.</p> <p>985. Declaring nuisances is not an exercise of judicial functions.</p> <p>986. Extent of authority illustrated.</p> <p>987. The same subject continued.</p> <p>988. Regulation of occupations.</p> <p>989. Powers conferred on boards of health not exclusive.</p> <p>990. Power to control manufactures.</p> <p>991. Limitations of police power over occupations.</p> <p>992. Establishment of sanitary districts.</p> <p>993. The same subject continued.</p> <p>994. Reasonableness of ordinances.</p> <p>995. Regulating removal of garbage.</p> <p>996. Regulating burials and burial permits.</p> <p>997. Boards of health generally.</p> <p>998. Powers of town trustees in Iowa as boards of health.</p> <p>999. Power of boards of health as to employment of physicians.</p> <p>1000. Owner of property condemned as a nuisance entitled to a hearing.</p> <p>1001. The same subject continued.</p> <p>1002. Conclusiveness of determination by board of health.</p> | <p>§ 1003. Power of board of health as a corporation—New Jersey decisions.</p> <p>1004. The same subject continued.</p> <p>1005. Injunction upon application of board of health in New Jersey.</p> <p>1006. Abatement of nuisances under general authority to promote health.</p> <p>1007. Power to forbid the exercise of offensive trade.</p> <p>1008. Actions by town boards of health to suppress nuisances by injunction.</p> <p>1009. Expenditures by boards of health, to what municipal corporation chargeable.</p> <p>1010. No corporate liability for torts of health officers.</p> <p>1011. The same subject continued.</p> <p>1012. Personal liability of members of board of health for negligence.</p> <p>1013. The same subject continued.</p> <p>1014. Quarantine regulations generally.</p> <p>1015. Extent of power of municipal authorities.</p> <p>1016. Liability of owner of vessel for quarantine expenses.</p> <p>1017. Power and duty of boards of health under Florida quarantine laws.</p> <p>1018. Charges against vessels in quarantine.</p> <p>1019. A limitation upon quarantine regulations.</p> |
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§ 983. Municipal regulations for the promotion of public health.— One of the most important functions of those con-

trolling the government of our various municipal corporations is in the matter of assuring good health to the people composing these communities. There is a power expressly, or by implication, conferred upon all municipal governing boards, as a part of the police power of the States, delegated to them by the legislature, to pass ordinances and to enforce them, which will guaranty to the public healthful food, by regulations for inspection of food and preventing the sale of articles improper to be eaten to the public, and, by the supervision of the avocations of individuals and their mode of conducting their business within the limits of the corporation, protect the inhabitants against all noxious odors which tend to taint and render impure the air which they breathe. The only restriction upon the boards controlling in such legislation is that the ordinances and regulations must be consistent with the constitution and laws of the State, and reasonable in so far as they affect the general public or individual rights.¹

§ 984. Power of the State legislature.—In affirming the validity of a municipal ordinance enacted under a general power in a charter to make such ordinances as might be deemed necessary and proper for the protection of the health of the citizens, the Supreme Court of Connecticut stated the rule broadly as follows:—“Of absolute necessity this power inheres in every organized community; otherwise there would be only organized suicide. It takes unwritten precedence of all provisions for the protection of rights of property, and includes the right to require as much of the services or property of each as may be necessary to the preservation of the lives of all, without provision for payment therefor. The people of this State have not by the constitution parted with any portion of this power which was in them, nor have they put any limitation upon themselves as to the exercise of it. It is now as fully in the legislature as at the beginning it was in the people.”²

¹ See chapter on NUISANCES — SUPPRESSION OF, and chapter on EXPRESS POWERS.

² State v. Wordin (1888), 56 Conn.

216; s. c., 14 Atl. Rep. 801. Applying this doctrine, the court there held that an ordinance is constitutional which required a physician, upon his

§ 985. Declaring nuisances is not an exercise of judicial functions.—It was urged in a California case that the legislature could not pass nor authorize a municipal board to pass an ordinance,—one prohibiting the establishing or maintaining slaughter-houses, etc., within the limits of the corporation,—for the reason that the enactment involved an exercise of judicial power. The Supreme Court held that the order in question did no more than lay down a rule for the future guidance of all men, irrespective of calling, which was within the power of the legislative department. It was not an exercise of judicial power. Further, the fact that the legislature in the enabling statute empowered the municipal board to determine what should be necessary “for the preservation of the public health and the prevention of contagious diseases,” etc., and the fact that the board acting within the scope of its authority determined the characteristics and injurious tendencies of the several acts forbidden in the order, did not stamp a judicial character upon either the statute or order.¹

§ 986. Extent of authority illustrated.—Under the extensive police powers of the State the legislature may limit the area of soil to be cultivated, when in its judgment the public health so demands, and may delegate this same power to a municipality to be exercised within its corporate limits.² The governing authority of a municipal corporation authorized by statute “to remove or confine persons having infectious or pestilential diseases” may rent buildings in which to confine such persons. The principle upon which this rule is based is that although such a corporation can only exercise

discovering that a patient of his is suffering from a contagious disease, to report the same forthwith to any official of the corporation named, with full particulars, under penalty. See, also, *Robinson v. Hamilton*, 60 Iowa, 134; *Parker and Worthington on Public Health and Safety* (1892), § 43.

¹*Ex parte Shrader* (1867), 33 Cal. 279. See, also, *Ex parte Heilbron* (1884), 65 Cal. 609; and as to the con-

stitutionality of such ordinances, *Ex parte Andrews*, 18 Cal. 678; *Coates v. Mayor &c.*, 7 Cowen, 585; *Vanderbilt v. Adams*, 7 Cowen, 349; *Van Wormer v. Mayor &c.*, 15 Wend. 263; *Cooper v. Metropolitan Board of Health*, 32 How. Pr. 107; *Ex parte Smith*, 38 Cal. 702; *Johnson v. Simon-ton*, 43 Cal. 242.

²*Town Council of Summerville v. Pressley* (1889), 33 S. C. 56; s. c., 11 S. E. Rep. 545.

such powers as are conferred upon it, either expressly or by necessary implication, by the law under which it is incorporated, yet where the power to do an act is conferred upon the corporation and the law is silent as to the manner of doing such act, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which it shall be done.¹

§ 987. **The same subject continued.**—The extraordinary powers of a board of health in exercising authority to examine into nuisances and sources of filth and cause the same to be removed were vigorously expounded by the Supreme Court of Connecticut. It was held that the members of a board of health were not liable for an error of judgment in causing the removal as a nuisance of property which they believed to be the cause of the prevalence of a malignant disease; that there was no redress in such a case for a mere error of judgment. In answer to the contention that the statute was unconstitutional the court said:—"The property was not taken for public use within the meaning of the constitution. It was destroyed for the protection of the public health." Again:—"If life may be protected by destroying life when apparently necessary, but not so in fact, may not life be protected by destroying property when apparently necessary, though afterwards discovered not so in fact? . . . The justification of the board of health in the destruction of the property must come in *seemingly* extreme cases where there is a reasonable ground to believe that immediate action is necessary for the preservation of the life and health of the inhabitants, and where there is reasonable ground to believe the supposed nuisance to be one in fact."²

¹ *City of Anderson v. O'Conner* (1884), 98 Ind. 168. See, also, *Intendant of Livingston v. Pippin*, 31 Ala. 542; *Rome v. Cabot*, 28 Ga. 50; *Harrison v. Baltimore*, 1 Gill (Md.), 264. In *City of Hannibal v. Richards* (1884), 82 Mo. 330, it was held that the city could not recover the cost of filling up the lots of defendant, which the council had ordered him to fill

up and he had failed to do so. The ground upon which the decision rested was that the city having by its action created the nuisance, it could not compel the owner to abate it. See, also, *Weeks v. City of Milwaukee*, 10 Wis. 269.

² *Raymond v. Fish*, 51 Conn. 80. But the court, approving *City of Salem v. Eastern R. Co.*, 98 Mass.

§ 988. **Regulation of occupations.**—There is in the various State constitutions or statutes authority for the governing bodies of municipal corporations to regulate avocations of their citizens in the interest of good morals, good health and public safety. And the courts have usually upheld ordinances, orders or resolutions of such bodies, treating them in such instances as prohibiting the conduct of the business in a manner beyond the limitations imposed in the municipal legislative acts.¹

§ 989. **Powers conferred on boards of health not exclusive.**—The establishment of general and local boards of

481, expressly refrained from deciding how far the board might go in this direction; where the destruction of property may not seem to require such summary action. See the comments in this case in Parker and Worthington on Public Health and Safety, § 173, note 1, and the criticism of *Salem v. Eastern R. Co.*, in *Miller v. Horton*, 152 Mass. 545.

¹ In *In re Linehan* (1887), 72 Cal. 114; s. c., 13 Pac. Rep. 170, an ordinance of a city prohibiting the keeping of more than two cows within certain portions of the city limits was treated by the court as one prohibiting the herding of cattle, and was held to be valid and within the power of the council, under the State constitutional provision that "any county, city, town or township may make and enforce, within its limits, all such local, police, sanitary and other regulations as are not in conflict with general laws," and a statute authorizing the board of supervisors of the city to regulate or exclude occupations detrimental to good morals or contrary to order or dangerous to the public safety. In *Ex parte Shrader* (1867), 33 Cal. 279, an order of the board of supervisors of the same city prohibiting the establishing or maintaining slaughter-houses, herding swine, keeping or curing

hides, slaughtering cattle, pursuing, maintaining or carrying on any other business or occupation offensive to the senses or prejudicial to the public health and comfort, in any part of the corporation, was held to be within their power and a proper exercise of it. In *Ex parte Cassinello* (1881), 62 Cal. 538, an ordinance of the same board prohibiting the throwing into or depositing upon the public streets, etc., except in such places as might be designated, any glass, broken ware, dirt, rubbish, garbage or filth, was held to be valid. Morrison, C. J., said:—"The objections that the order is oppressive, unjust and unreasonable are, in my opinion, not well taken. That dirt, rubbish, garbage and filth are in their nature nuisances is too plain to admit of controversy; and that glass and broken ware can be very easily converted into nuisances if thrown about promiscuously is equally plain." Again:—"The regulation in this case, instead of being arbitrary, unreasonable or unjust, was a wise and salutary one, calculated to promote the welfare and best interests of the city, and was in its nature and purpose a salutary police regulation, designed to protect the safety and health of the inhabitants of the city."

health by the legislature is not to be regarded as detracting from the general powers of municipal governments, unless the legislative intent clearly appears. Though the health laws may bring within the cognizance of their constituted boards offenses prohibited by town ordinances because they injure the public health, yet they are not necessarily antagonistic to the exercise by the municipality of power to regulate and repress noxious and offensive creations, within the statute.¹ A municipal corporation may determine what, in its nature and use, it deems a nuisance, and may direct its removal or discontinuance under the penalties which it is, by legislative authority, authorized to impose or inflict.²

§ 990. Power to control manufactures.—The preservation of health is one of the paramount objects of government which belongs to the police power, subject to the proper exercise of which either by the State legislature, or by public corporations to which the legislature may delegate it, every citizen holds his property.³ All rights are held subject to the police power of the State; and if the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience. And as the police power of a State ex-

¹ *State v. Lowery* (1887), 49 N. J. Law, 391, in which the court held that the proper control of the time and mode of cleaning sinks, cess-pools, etc., was not only a legitimate subject of municipal concern, but was imperatively demanded by a just regard for the comfort and health of the citizens.

² *Mayor &c. of Monroe v. Gerspach* (1881), 33 La. Ann. 1011, sustaining an ordinance requiring the filling up of certain vaults, sinks or privies. See, also, *Kennedy v. Phelps*, 10 La. Ann. 227, where the court said:—"The power to abate nuisances is a portion of police authority, necessarily vested in the corporations of all populous towns." In *Hart v. Mayor of Albany*

(1833), 3 Paige, 213, 218, the chancellor said:—"The question of nuisance or no nuisance, however, is always a question of fact, in relation to which the opinions of individuals will necessarily differ. It therefore becomes necessary, in all populous towns, to regulate such matters by police ordinances; and public policy requires that the corporations of the place should not be disturbed in the exercise of their powers, unless they have clearly transcended their authority."

³ *Wilson v. Board of Trustees* (1890), 133 Ill. 443; s. c., 27 N. E. Rep. 203; *Dillon on Munic. Corp.*, §§ 93, 96; *Cooley on Taxation* (1st ed.), 101.

tends to the protection of the lives, health and property of her citizens, the maintenance of good order, and the preservation of the public morals, the legislature cannot by any contract divest itself of the power to provide for these objects.¹

§ 991. Limitation of police power over occupations.—It was said by Judge Sawyer, in a case in the United States circuit court:—"To make an occupation indispensable to the health and comfort of civilized man, and the use of the property necessary to carry it on, a nuisance, by a mere arbitrary declaration in a city ordinance, and suppress it as such, is simply to confiscate the property and deprive its owner of it without due process of law. It also abridges the liberty of the owner to select his own occupation and his own methods in the pursuit of happiness, and thereby prevents him from enjoying his rights, privileges and immunities, and deprives him of equal protection of the laws secured to every person by the constitution of the United States."² In another case the same judge said:—"The police power only extends to the regulation of the necessary pursuits of man, so that they shall not become, in their mode of exercise, unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of the community. It does not extend to the destruction or driving to inconvenient and unprofitable localities of necessary or useful occupations carried on in such manner as to be harmless."³

§ 992. Establishment of sanitary districts.—In some instances it has been the policy of the legislature to organize

¹ *Beer Co. v. Massachusetts* (1877), 97 U. S. 25. The court said:—"They [these objects] belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." See, also, *Boyd v. Alabama*, 94 U. S. 645.

² *In re Sam Kee* (1897), 31 Fed.

Rep. 680. An ordinance of a city declaring it a nuisance, and making it an offense to keep a laundry, wherein clothes are cleaned for hire, within the limits of the larger part of a city, without regard to the character of the structure or the appliances used for the purpose, or the manner in which the occupation is carried on, was held to be unconstitutional and void. Following *Re Tie Loy*, 26 Fed. Rep. 611; *Yick Wo v. Hopkins*, 118 U. S. 356; s. c., 6 S. Ct. Rep. 1064.

³ *Re Tie Loy* (1886), 26 Fed. Rep. 611.

different political divisions into a sanitary district,—as, for instance, in New York, the Metropolitan District was organized by legislation from the counties of New York, Kings, Westchester and Richmond, with jurisdiction over the four counties. It was urged that this statute was in violation of the provision of the State constitution that the election of county, city, town and village officers should be by the electors therein instead of being appointed. The court disposed of this objection by holding that the legislature had authority to create new civil divisions of the States, embracing more than one county, for purposes of temporary or permanent civil government, not impairing, however, the county organization, and that officers over such newly created districts, could legally be appointed by the governor and senate.¹ To the objection that it violated the constitutional provision that “the trial by jury in all cases in which it has heretofore been used shall remain inviolate,” the court said that in matters relating to public health, where the public interests require action to be taken, juries had not been called in.² Nor do proceedings by removal of matter “dangerous to the public health,” and regulations “for the preservation of public health,” take away any man’s property. The power of boards of health to be exercised upon these subjects is administrative rather than judicial in its character.³

§ 993. The same subject continued.—The legislature may create a corporation including both city and county, and invest it with power to secure the public health by means of sewers and channels or drains. It was held in Illinois that there are no constitutional restrictions as to the boundary lines of public or municipal corporations within which new corporations may be formed, except as to counties. And it is unnecessary that the corporate authorities of a new corpora-

¹Metropolitan Board of Health v. Heister (1868), 37 N. Y. 661. See, also, *People v. Draper*, 15 N. Y. 532; *People v. Raymond*, 37 N. Y. 428; *People v. Metropolitan Police*, 19 N. Y. 188; s. c., 20 N. Y. 316; *People v. Pinckney*, 32 N. Y. 377; *Metropolitan Board v. Barrie*, 34 N. Y. 657.

²Metropolitan Board of Health v. Heister, 37 N. Y. 661.

³Metropolitan Board of Health v. Heister, 37 N. Y. 661. See, also, *Van Wormer v. Albany*, 15 Wend. 262; *Darlington v. The Mayor*, 31 N. Y. 164; *People v. Kerr*, 27 N. Y. 188.

tion should be also the corporate authorities of some specific pre-existing corporation.¹

§ 994. Reasonableness of ordinances.— The question of the reasonableness of an ordinance is a question of law for the court, and in determining it the court should not substitute its discretion for that of the municipal legislature. And the power of the court should not be hastily or incautiously exercised.¹

¹ *Wilson v. Board of Trustees &c.* (1890), 133 Ill. 443; s. c., 27 N. E. Rep. 203, in which the creation of such a district and vesting it with powers of taxation for sanitary purposes, co-extensive with the territory to be controlled, was sustained, the court holding that the propriety of its creation belonged alone to the General Assembly and not to the courts. See, also, *Shaw v. Dennis*, 5 Gilm. 405; *Dennis v. Maynard*, 15 Ill. 477; *People v. Salmon*, 51 Ill. 37; *Dunham v. People* 96 Ill. 331; *Greeley v. People*, 60 Ill. 191; *People v. Harper*, 91 Ill. 357; *Butz v. Kerr*, 123 Ill. 659; *Owners of Lands v. People*, 113 Ill. 304. As to shifting the burdens of government, *Springfield v. Power*, 25 Ill. 187; *Board of Supervisors v. Springfield*, 63 Ill. 66; *Logan County v. Lincoln*, 81 Ill. 156; *Seagraves v. City of Alton*, 13 Ill. 366; *Town of Fox v. Town of Kendall*, 97 Ill. 72; *People v. Supervisors of Will County*, 110 Ill. 511. As to the power of the legislature to create, annul and change municipal corporations, *People v. Wren*, 4 Scam. 269; *Rock Island County v. Sage*, 88 Ill. 583; *County of Richland v. County of Lawrence*, 12 Ill. 1; *Trustees &c. v. Tatman*, 13 Ill. 27; *Harris v. Board of Supervisors*, 105 Ill. 145; *Wetherell v. Devine*, 116 Ill. 631. As to the propriety of such organization of corporations being in the sole discretion and judgment of the legislature, *Reeves v. Treasurer of Wood County*,

8 Ohio St. 332; *Thompson v. Treasurer of Wood County*, 11 Ohio St. 338; *Anderson v. Kern's Drain Co.*, 14 Ind. 199; *O'Reilly v. Kankakee Drain Co.*, 32 Ind. 169; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Woodruff v. Fisher*, 17 Barb. 224; *Hartwell v. Armstrong*, 19 Barb. 166; *Drainage Co. Cases*, 11 La. Ann. 333; *Dean v. Davis*, 51 Cal. 406; *Donnelly v. Decker*, 58 Wis. 461; *State v. Stewart*, 74 Wis. 620.

¹ *Fisher v. Harrisburg*, 2 Grant (Pa.), 291; *Commonwealth v. Robertson*, 5 Cush. 438; *City of St. Louis v. Weber*, 44 Mo. 547. In *People v. Detroit White Lead Works* (1890), 82 Mich. 471; s. c., 46 N. W. Rep. 735, the Supreme Court of Michigan sustained the conviction of a corporation and its officers under an ordinance of a city prohibiting owners or occupants of any grocery, etc., from allowing any nuisance to exist or remain on his or her premises, and any person or corporations operating, owning, etc., any premises whatever creating or maintaining any nuisance thereon, the proof being that the operation of their business produced odors, smoke and soot of such a noxious character and to such an extent as to produce headache, nausea, vomiting and other pains and aches injurious to health, and to taint the food of the inhabitants. The court held that such ordinance was not invalid or unconstitutional because the general statutes of

§ 995. Regulating removal of garbage elsewhere.—A by-law of a city prohibiting any person not duly licensed by its authorities from removing the house dirt and offal from the city is not in restraint of trade, but reasonable and valid, on the ground that in the interest of the public health a city is justified in providing for some general system for removing offensive substances from its streets by persons engaged by the city and responsible for the work at such times as they are directed to attend to it.¹

the State provided for the conviction and punishment of those guilty of the like offense. See, also, *People v. Hanrahan*, 75 Mich. 611; *Cooley*, Const. Lim. 199; *State v. Ludwig*, 21 Minn. 202; *Shafer v. Mumma*, 17 Md. 331; *St. Louis v. Bentz*, 11 Mo. 61; *St. Louis v. Cafferata*, 24 Mo. 94; *Blatchley v. Moser*, 15 Wend. 215; *Levy v. State*, 6 Ind. 281. In *Brophy v. Hyatt* (1887), 10 Colo. 223; s. c., 15 Pac. Rep. 399, the Supreme Court of Colorado sustained the validity of an ordinance requiring the village marshal to take up, impound and sell stock found running at large within the corporate limits of a town as within the power to enact given to the town authorities by the statute "to declare what shall be a nuisance and to abate the same, and to impose fines upon parties who may create, continue or suffer a nuisance to exist," and another giving them power to "authorize the impounding and summary sale of horses, cattle, sheep, goats, swine and geese running at large within such city or town contrary to any ordinance thereof." The court further held that the ordinance did not work a forfeiture of the impounded animals, and was not in conflict with the provision of the constitution that "no person shall be deprived of life, liberty or property without due process of law." See, also, 1 Dillon on Munic. Corp., §§ 150,

348; *Gooselink v. Campbell*, 4 Iowa, 296; *Roberts v. Ogle*, 30 Ill. 460; *Hart v. Mayor*, 9 Wend. 589; *Grover v. Huckins*, 26 Mich. 476; *Mayor v. Lanham*, 67 Ga. 753; *Mayor v. King*, 7 Lea, 442; *Campau v. Langley*, 39 Mich. 451; *Campbell v. Evans*, 45 N. Y. 356.

¹ *Vandrice, Pet.* (1828), 6 Pick. 187. In *Commonwealth v. Patch* (1867), 97 Mass. 221, an ordinance of the city prohibiting the keeping of swine within particular districts of the city was held to be valid and its enactment within the power of the city authorities, who by default in the appointment of a board of health was endowed with the power to make such regulations as they judged necessary for the public health and safety respecting public nuisances, sources of filth and causes of sickness. It was urged also that it was an unauthorized ordinance in that it applied only to a part of the city. The court held that that fact was not material if that part of the city was so situated as to require peculiar and exceptional provisions in the way of sanitary regulations to promote the comfort and health of the inhabitants. Upon the same principles as in the foregoing case, the Supreme Court of Iowa, in *State v. Holcomb* (1885), 68 Iowa, 107, held a regulation adopted by the board of health of a city and enforced by an

§ 996. **Regulating burials and burial permits.**—Power to regulate burial permits may properly be conferred on municipal corporations. Such a corporation authorized to make police regulations or to pass by-laws respecting the health, good government and welfare of the place is thereby authorized to regulate burials.¹ And in exercising its power to preserve the health of the community, the municipal authorities may make reasonable rules as to the places and mode in which interments may be made in the cemeteries provided for the burial of the dead.² The Supreme Court of Massachusetts has held as to a provision in an ordinance of a town “that no person should, without leave in writing signed by a majority of the selectmen, bring into the town any dead body or convey through the streets any dead body so brought into the town; or bury any dead body so brought into the town on any part of his own premises or elsewhere within the town,” that the first clause was not authorized by the statute authorizing the establishment of a board of health, and authorizing the selectmen of the town to appoint and locate places for the burial of the dead, make police regulations for the same, and regulations for funerals and the interment of the dead, and was therefore void; and that the latter clause was not a regulation but a prohibition, and, if it were not a prohibition,

ordinance providing a penalty for its violation, prohibiting hog pens, not void for unreasonableness. In *Boehm v. Mayor &c. of Baltimore* (1883), 61 Md. 259, it was held that the city, under the power to preserve the health and safety of its inhabitants, had the undoubted right to pass ordinances creating boards of health, appointing health commissioners with other subordinate officers, regulating the removal of house dirt, night soil, refuse, offal and filth by persons licensed to perform such work, and providing for the prohibition, abatement and suppression of whatever was intrinsically and inevitably a nuisance. And the Supreme Court held that ordinances as to “privies” placing them under the supervision and

control of the board of health with certain regulations were a lawful and proper exercise of the power “to preserve the health of the city, and to prevent and remove nuisances.”

¹ *Graves v. City of Bloomington* (1885), 17 Ill. App. 476.

² *New Orleans v. St. Louis Church*, 11 La. Ann. 244; *Musgrave v. St. Louis Church*, 10 La. Ann. 431; *Kincaid's Appeal*, 66 Pa. St. 411; s. c., 5 Am. Rep. 377; *Bogert v. Indianapolis*, 13 Ind. 134; *City Council v. Baptist Church*, 4 Strobb. 306; *Coates v. Mayor &c.*, 5 Cowen, 585; *Brick Presbyterian Church v. New York*, 5 Cowen, 538; *Commonwealth v. Fahey*, 5 Cush. 408; *Commonwealth v. Goodrich*, 13 Allen, 546; *In re Keeney* (Cal., 1890), 24 Pac. Rep. 34.

yet, when not applied to a very populous part of the town, an unreasonable regulation, and therefore void.¹

§ 997. Boards of health generally.—For the protection of the health of the public, we have now, in the most of our States, State boards of health, in addition to a national board of health; but we will treat simply of local boards of health and their powers. Boards of health in municipalities of all classes are provided for by statutes in our different States very generally. Where there may not be regular so-styled boards of health, the powers usually conferred upon such boards are by statute reposed in the governing authorities of such communities. The powers given to such boards are in their nature almost absolute, and in a sense arbitrary, because of necessity. They are intrusted with the care of the health of the community, and in guarding it must act with great promptitude in emergencies when delay is dangerous. These powers, in the matter of quarantine and regulations as to persons or places afflicted with contagious or infectious diseases, have so often been exercised, and the right to exercise the same questioned in courts of law, and adjudicated universally to be properly and constitutionally conferred upon the boards by the legislature, that they are now universally conceded.

§ 998. Power of town trustees in Iowa as boards of health.—Township trustees are by the code of Iowa constituted a board of health, and have charge of all cemeteries within the limits of their township dedicated to public use, and not controlled by trustees or other corporate bodies.

¹ *Austin v. Murray* (1834), 16 Pick. 121. It seems further that this regulation was intended to interfere with the right of the Catholic bishop of a near-by city to have the dead of his church in the city interred in a cemetery provided for the purpose located in the town. The court said as to this:—"It is a clear and direct infringement of the right of property without any compensating advantages, and not a police regulation

made in good faith for the preservation of health. It interdicts or in its operation necessarily intercepts the sacred use to which the Catholic burying ground was appropriated and consecrated according to the form of the Catholic religion, and such an interference, we are constrained to say, is wholly unauthorized and most unreasonable." *Austin v. Murray*, 16 Pick. 121.

Under the provision which empowers them to make regulations for the protection of the public health, and respecting nuisances, sources of filth and causes of sickness in their respective townships, they can lawfully sell lands purchased for cemetery purposes, but deemed by them unsuitable for the purpose, subject to a condition that they shall not be used for cemetery purposes, private or public.¹

§ 999. Power of boards of health as to employment of physicians.—A township board of health cannot delegate its statutory power to employ a physician to a committee, none of whom are members of the board; nor can the members of a board, by their separate acts and declarations, ratify the employment of a physician by such a committee.²

¹ *Bushnel v. Whitlock* (1889), 77 Iowa, 285; s. c., 42 N. W. Rep. 186, in which an injunction to restrain such a sale was refused. In *Christy v. Whitmore* (1885), 67 Iowa, 60, involving the power of the same board of trustees as health boards, it was held that although they had purchased this land for a cemetery, they had discretion as to its use, and that they could not be compelled by *mandamus* to devote it to that purpose, if for any reason they deemed it unsuitable. In *Bushnel v. Whitlock*, *supra*, the court said:—"The law invests them [the trustees] with a discretion as to what is deleterious to public health and the power to cause its abatement. . . . A reason for not using it [this land] as a cemetery in the minds of the trustees may be that as such it would impair the health of a community, and the purpose of the sale would be to effect a change in location; and if sold without the restriction the entire purpose of the sale would be defeated."

² *Young v. County of Blackhawk* (1885), 66 Iowa, 460, where the court held that a physician's charges for attention to patients quarantined in a village suffering from small-pox

could not be recovered from the township, although a committee under orders of the trustees of the township, who constituted the board of health, had engaged him to do so, and notwithstanding the trustees had individually approved his doing so. See, also, *Herrington v. District Tp. of Liston*, 47 Iowa, 11. A board must act as a unit and in the manner prescribed by statute establishing such board. The determination of members individually is not the determination of the board. *McCullough v. Moss*, 5 Denio, 577; *Livingston v. Lynch*, 4 Johns. Ch. 596; *Rice v. Plymouth County*, 43 Iowa, 136; *Taylor v. Dist. Tp. of Wayne*, 25 Iowa, 447. In *Wilkinson v. Township of Long Rapids* (1889), 74 Mich. 63; s. c., 41 N. W. Rep. 861, however, it was held that a physician employed by the agent of a township board of health to treat scarlet fever patients under a resolution of the board authorizing such agent to quarantine the patients until the danger of communicating the disease had passed, and, during such time, to provide for their wants, was entitled to recover from the township the reasonable value of his services rendered under

§ 1000. Owner of property condemned as a nuisance entitled to a hearing.—The police powers invested in municipal bodies by which the public health is secured or protected is not only respected but maintained by the courts, which as a matter of public policy will not interfere with or disturb municipal bodies in the legitimate exercise of this power. It is only when those bodies transcend their limits in that respect that the aid of the courts can be successfully invoked to restrain them or to visit upon them the injurious consequences of their acts.¹ A person cannot be deprived of the use of his property for the purpose of his lawful business by force of an adjudication of a board of health under its powers over the matter of nuisances, made without notice to him, and without giving him an opportunity to be heard in his defense.²

§ 1001. The same subject continued.—A law authorizing boards of health to receive complaints concerning nuisances, to enter and examine premises on which nuisances are believed to exist, requiring them to furnish the owners or occu-

such employment. The court said:—"The board of health has power, and it is its duty, in such cases, if necessary, to employ a physician, and the township is primarily liable in the premises; another physician so employed is not bound to look anywhere else for payment." *Rae v. Flint*, 51 Mich. 526; s. c., 16 N. W. Rep. 887; *Elliott v. Supervisors*, 58 Mich. 452; s. c., 25 N. W. Rep. 461.

¹ *Weil v. Ricord* (1873), 24 N. J. Eq. 169, in which it was held that the board of health of a city in the legitimate exercise of its powers could not absolutely prohibit the carrying on of a lawful business not necessarily a nuisance, but which might be conducted without injury or danger to the public health and without public inconvenience; and that the board of health would be confined in their interference with the lawful business of any individual to such inter-

ruptions as might be reasonably necessary to enable them to abate any nuisance the individual might create in conducting it.

² *Weil v. Ricord* (1873), 24 N. J. Eq. 169. See, also, *City of Salem v. Eastern R. Co.*, 98 Mass. 431; *Belcher v. Farrar*, 8 Allen, 325, in which the Supreme Court of Massachusetts said:—"It would violate one of the fundamental principles of justice to deprive a party absolutely of the free use and enjoyment of his estate under an allegation that the purpose to which it was appropriated, or the mode of its occupation, was injurious to the health and comfort of others and created a nuisance, without giving the owner an opportunity to appear and disprove the allegation and protect his property from the restraint to which it was proposed to subject it."

pants a written statement of their conclusion, and empowering them to suppress nuisances, was held to be constitutional as against the contention that it violated the provision that no person should be deprived of life, liberty or property without due process of law.¹ "Had it declared," said the court, "that such a proceeding could be maintained without notice to the parties most interested therein, then the question of its constitutionality would have fairly arisen and been easily decided." The implication that notice was intended was deduced from the terms of the act.²

§ 1002. Conclusiveness of determination by board of health.—As to the powers of boards of health in dealing with nuisances, the Supreme Court of Massachusetts said:—"The authority of the board of health in respect to particular nuisances stands upon a similar ground [that is, that of police regulations]. Their action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed and delayed as little as possible by the necessary observance of formalities. . . . There are many cases in which powers of determination and action of a *quasi-judicial* character are given to officers intrusted with duties of local or municipal administration by which not only the property but the lives of individuals may be affected. Of this class are the authority of fire-wardens or other officers to direct buildings to be demolished to prevent the spreading of fires, of magistrates to require aid and to use force, armed or other-

¹ *People v. Board of Health* (1891), 12 N. Y. Supl. 561.

² *People v. Board of Health*, 12 N. Y. Supl. 561. "No proper inquiry leading to a final order affecting private rights can be made without hearing both sides. . . . So firmly is this fundamental principle embedded in our judicature that it is not necessary even in acts in derogation of the common law, to prescribe in words that notice of the hearing to a party proceeded against shall be

given. . . . While it is true that the board of health may, and in certain instances it should, in the discharge of its public duties, make *ex parte* examinations, yet, before a final determination is made which will put the accused person to expense, or which will deprive him of his right to carry on his business, he should be apprised of the substance of the charge and thus enabled to defend himself before final judgment."

wise, to suppress tumults; of the mayor or other officers to call out the military force for the like purposes. . . . We think these principles apply to the proceedings of a board of health. Their determination of questions of discretion and judgment in the discharge of their duties is undoubtedly in the nature of a judicial decision; and within the scope of powers conferred and for the purposes for which the determination is required to be made, it is conclusive. It is not to be impeached or set aside for error or mistake of judgment, nor to be reviewed in the light of new or additional facts. The officers or board to whom such determination is confided, and all those employed to carry it into effect or who may have occasion to act upon it, are protected by it, and may safely rely upon its validity for their defense. It is in this sense that such adjudications are often said to be conclusive against all the world; and they are so, so far as the *res* is concerned.”¹ The powers and duties of inspectors, as, for instance, of fish offered for sale in a city, and to destroy all such as are unwholesome and unsuitable to be eaten, are judicial in their nature; and such an official cannot be held liable for the careless, improper or erroneous performance of such duties.²

§ 1003. Power of board of health as a corporation—

New Jersey decisions.—Boards of health are *quasi*-corporations, and as to their acts the same principles ordinarily applicable to municipal bodies apply. They must follow the mode prescribed by the legislature for doing any act. Where an ordinance of the board is required by statute they must pass an ordinance for it to be effective; but where the statute which confers upon it its powers does not expressly prescribe that there shall be an ordinance, these boards may act by a

¹ *City of Salem v. Eastern Railway Co.*, 98 Mass. 431.

² *Fath v. Koepfel* (1888), 72 Wis. 289; s. c., 39 N. W. Rep. 539. The Supreme Court of Wisconsin thought the principle of non-responsibility of judicial officers in actions for damages should especially protect an inspector of meats and fruits acting

in the interest of the public health. See, also, *Raymond v. Fish*, 51 Conn. 86, applying it to a board of health; *Seaman v. Patten*, 2 Caines, 312, applying it to an inspector of provisions; *Downer v. Lent*, 6 Cal. 94, applying it to a board of pilot commissioners.

simple resolution.¹ It was urged in another case that a board of health had exceeded its powers in granting a license for scavengering, and especially in designating a place where night soil could be collected and deposited, admitting the authority of the board to prohibit and remove. To this the Supreme Court said:—"The legislative language was employed with respect to *quasi*-corporations, which it was the object of the legislature to create, and to endow with such powers as were essential and necessary to enable them to carry out the purposes of their creation. When the scope of their powers has been defined, and the general manner of their exercise indicated, it is a presumption of law that the corporation possesses likewise all those powers necessarily and fairly implied in or incidental to the powers expressly granted."²

§ 1004. The same subject continued.—Under the power of a board of health under the statute of New Jersey and a sanitary code adopted by its authority by a board as to regulation and control of cesspools and privies, the board has power to designate how, when and where night soil should be collected, conveyed and deposited, provided the board does not, in the execution of the power thus reposed in it, create a nuisance of which a private prosecutor may complain.³ And a court of law cannot, upon a mere apprehension of individuals

¹ *State v. Board of Health* (N. J., 1892), 23 Atl. Rep. 949; *Green v. Cape May*, 41 N. J. Law, 45.

certiorari to review the action of the board of health of a New Jersey city, the court held under the statutes of that State, an ordinance having been passed to declare the general purpose of a board as to disposing of night soil, etc., and providing for a license to persons or corporations to do the business of scavengering, the board was empowered to license any one by a resolution. See, also, *Green v. Cape May*, 41 N. J. Law, 45; *City of Burlington v. Dennison*, 42 N. J. Law, 165; *Butler v. Passaic*, 44 N. J. Law, 171.

² *State v. Board of Health* (N. J. L.,

³ *State v. Board of Health* (N. J. L., 1892), 23 Atl. Rep. 949. The court said:—"The power to remove any and all offensive matters from any and all public and private places would be nugatory if the board were powerless to provide a place or places to which, and to prescribe the conditions under which, a removal and deposit of such matters might be had. The power 'to regulate and control the method and manner of emptying cesspools and privies' has likewise inherent in it the power of both prohibiting and directing where the contents may be deposited. Indeed, the

that the lawful action of the board of health in ordering a deposit of night soil in a particular place will result injuriously to these individuals, annul an ordinance passed with that object in view. The principles which govern a court of law as to annulling the action of a board of health are the same as given in equitable actions to restrain and enjoin as a nuisance the doing of something by a municipal board which would amount to a nuisance *per se*.¹

§ 1005. Injunction upon application of board of health in New Jersey.—The board of health of a city, as a relator in the name of the State of New Jersey, may file a bill to enjoin as a nuisance and as hazardous to the public health the emptying of filth from drains of a building into a stream running through the city.²

more closely the legislation is studied the more clearly will it appear that one of the most important duties committed to these boards is the regulation of cesspools and the control of the final disposition of their contents."

¹ *State v. Board of Health* (N. J. L., 1892), 23 Atl. Rep. 949. Garrison, J. said:—"To seek out and employ new methods of disposing of this common bane is not only within the authority of the municipal board whose action is not under review, but is their chief and most responsible duty; and where the record shows the adoption by such board of a method looking to this, and upon the recommendation of a committee appointed to investigate its feasibility, and by resolution which provides for the revocation of the permit upon the occurrence of any element of nuisance, this court would not, in my opinion, be justified in declaring such action null and void at the suggestion of private prosecutors who apprehend that the process adopted will not prove to be successful." See, also, *Newark Aqueduct Board v. City of Passaic*, 45 N. J.

Eq. 393; s. c., 18 Atl. Rep. 106; Same *v. Lowe*, 46 N. J. Eq. 552; s. c., 20 Atl. Rep. 54; 22 Atl. Rep. 55.

² *State v. Hutchinson* (1884), 39 N. J. Eq. 218. In this case there was an objection that the board of health was organized with some irregularities, which was overruled. It was urged also by way of defense that the owners of the building—a hotel—were licensed by the city council by an ordinance to insert in their building and under ground the pipes and conduits with the privilege of conveying the filth complained of into the stream, and that this license amounted to a contract on the part of the city which could not be repealed. Upon this defense the chancellor ruled that there was no power in the legislature to authorize such a license; and that if there was the power of the board of health to abate or enjoin, as they proposed to do here, through a bill in chancery, a nuisance, was complete whether it was licensed or unlicensed. The only question was, is it hazardous to the public health. These rulings were affirmed on appeal by the Court of

§ 1006. **Abatement of nuisances under general authority to promote health.**—The power to abate nuisances is usually expressly conferred upon legislative bodies, but if not, it would result from the general powers conferred upon municipal authorities to do all acts and by ordinance to enact such laws as will tend to preserve and protect the public health.¹ Such a power is necessarily vested in the municipal authorities of all populous towns.² While in the power of legislatures to invest municipal corporations with the power to determine what is a nuisance,³ in the absence of such a power expressly conferred, the adjudications of the courts have been in the direction of restricting such power as far as it is derived from the general powers with reference to health regulations or as a police power. They cannot arbitrarily declare a thing a nuisance or destroy what has been lawfully erected when not a nuisance *per se*, until it is judicially determined to be a nuisance.⁴

§ 1007. **Power to forbid the exercise of an offensive trade.**—The Supreme Court of Massachusetts, in a well-considered case involving the power of a board of health of a city, have established satisfactory rules as to the power of such a board and its exercise of those powers under the Massachusetts statutes. The statute empowered the board of health of a city to forbid the exercise within the limits of the city, or in any particular locality thereof, of “any trade or employment which is a nuisance or hurtful to the inhabitants, or dangerous to the public health, or the exercise of

Errors and Appeals of the State and the nuisance perpetually enjoined in *Hutchinson v. State* (1885), 39 N. J. Eq. 569.

¹ *Baker v. Boston*, 12 Pick. 184; s. c., 22 Am. Dec. 421.

² *Kennedy v. Phelps*, 10 La. Ann. 227; *State v. Heidenhain*, 42 La. Ann. 483; s. c., 7 So. Rep. 721, in which it was held that an ordinance prohibiting smoking in the street cars under the penalty of fine and imprisonment was in the power of the city council under the authority given in its charter to maintain the public

health and to suppress all nuisances. *Louisville City R. Co. v. Louisville*, 8 Bush, 415; *Helen v. Noe*, 3 Ired. 493.

³ *St. Louis v. Stern*, 3 Mo. App. 48.

⁴ *State v. Jersey City*, 29 N. J. Law, 170; *Clark v. Mayor &c. of Syracuse*, 13 Barb. 32; *Chicago v. Laflin*, 49 Ill. 172; *Babcock v. Buffalo*, 56 N. Y. 268; *Wreford v. People*, 14 Mich. 41; *Pieri v. Shieldsboro*, 42 Miss. 493; *Ward v. Little Rock*, 41 Ark. 526; s. c., 8 Am. & Eng. Corp. Cas. 397. Cf. *Montgomery v. Hutchinson*, 13 Ala. 573.

which is attended by noisome and injurious odors, or is otherwise injurious to their estates." An order of the board of health forbidding "the exercise of the trade or employment of preparing tripe, in manufacturing neat's-foot oil, tallow and glue stock," etc., was sustained as a valid exercise of its power under the statute. The court said:—"But [the] order . . . is not in the nature of an adjudication of a particular case, but of a general regulation of the trade or employment. . . . It is not to be construed with technical strictness, but with the same liberality as all votes and proceedings of municipal bodies or officers who are not presumed to be versed in forms of law; and every reasonable presumption is to be made in its favor.¹ It need not state in direct terms that the trade which it prohibits is a nuisance. It is sufficient if the order clearly shows that in the opinion of the board of health the exercise of such trade will be hurtful to the inhabitants or injurious to the public health, or be attended by noisome and injurious odors." It was held that in a suit in equity brought by the board of health in the name of the city to enjoin the exercise of the offensive trade forbidden by its order, it was not competent for the defendant to prove that the trade was not a nuisance, upon the ground that the order by the board of health was a *quasi*-judicial act and could be reviewed only in the manner provided in the statutes. The constitutionality of the statute giving the power was also sustained.²

¹ Commonwealth v. Patch, 97 Mass. 231.

² Taunton v. Taylor (1874), 116 Mass. 254. The court said:—"The authority of the legislature to confer powers of this character for the protection of the public health and the suppression of nuisances upon municipal boards or officers is well settled. Such powers must be summarily exercised in order to accomplish their object. To allow the offensive trade to be carried on until it had been decided by a jury to be a nuisance, and the questions of law arising upon such trial had been determined by the court, would defeat the purpose

of the statutes. It is a case in which private rights must be held subordinate to the public welfare, and falls within the strict interpretation of the maxim, *Salus populi suprema lex*. The rights of any person to be affected by the order of prohibition are reasonably secured by requiring the order to be served upon him or the person in charge of his business, and by allowing him an appeal to a jury to be impaneled immediately, without waiting for a regular term of court, and by whose verdict the order may be altered, annulled or affirmed." Belcher v. Farran, 8 Allen, 325.

§ 1008. Actions by town boards of health to suppress nuisances by injunction.—A town board of health in New York can lawfully make an order for the suppression and removal of a nuisance consisting of the discharge of sewerage on lands of the town by a city, and can maintain an action to enjoin its violation by the city. It is given by the statute which creates boards of health in towns with power to hear complaints concerning nuisances and to make and enforce orders.¹ An action by a board of health for a penalty imposed by a board organized under this law for the maintenance of a nuisance may be brought in the name of the board without naming the individual members thereof.²

§ 1009. Expenditures incurred by board of health, to what municipal corporation chargeable.—When the compensation of a secretary, who is the health officer under the Indiana statute which provides that the secretary of local boards of health shall be the health officer, and shall be allowed such compensation as the board electing him may determine, has been determined by a board of health, the county commissioners should cause it to be paid by an auditor's warrant on the county treasurer.³

¹ *Bell v. City of Rochester* (1890), 11 N. Y. Supl. 305, following *Gould v. City of Rochester*, 105 N. Y. 46; s. c., 12 N. E. Rep. 275, which discusses very fully cases upon rights of action in cases of this kind.

² *Board of Health v. Valentine* (1890), 32 N. Y. St. Rep. 919. See, also, *Board of Health v. Casey*, 18 N. Y. St. Rep. 251, in which case it was further held that a landlord was responsible for maintaining the nuisance. As to liability of owners for defective construction and dangerous condition of premises, see *Moody v. Mayor*, 43 Barb. 282; *Cheetham v. Hampson*, 4 T. R. 318; *Rosewell v. Prior*, 2 Salk. 460; s. c., 1 Ld. Raym. 713; *Moak's Underhill on Torts*, 253-255; *Wood on Nuisances*, 76-80; *Owings v. Jones*, 9 Md. 108; *Ahern v. Steele* (1889), 115 N. Y. 203; s. c., 29

N. Y. St. Rep. 295; *Pennruddock's Case*, 5 Coke, 100b; *Pierson v. Glean*, 14 N. J. Law, 37; *Plumer v. Harper*, 3 N. H. 88; *Woodman v. Tufts*, 9 N. H. 88; *Eastman v. Company*, 44 N. H. 146; *Carlton v. Redington*, 21 N. H. 291; *Johnson v. Lewis*, 13 Conn. 303; *Noyes v. Stillman*, 24 Conn. 15; *Pillsbury v. Moore*, 44 Me. 154; *Beavers v. Trimmer*, 2 N. J. Law, 97; *McDonough v. Gilman*, 3 Allen, 264; *Hubbard v. Russell*, 24 Barb. 404.

³ *Waller v. Wood* (1884), 101 Ind. 138. The amount of compensation of this officer is a matter of discretion with the board of health and no appeal will lie from it. *Sims v. Board*, 39 Ind. 40; *Moffitt v. State*, 40 Ind. 217; *Grusenmeyer v. City of Logansport*, 78 Ind. 549. As to the determination of salary by board of health,

§ 1010. No corporate liability for torts of health officers.— A board of health legally organized under the statutes of the State, or by the terms of the charter of a municipal corporation, in the discharge of its duties acts under the powers by statute granted to it, and as an independent body, not under direction of the corporation through its governing authorities. It acts in the performance of the duty imposed upon it by the legislature. It is bound to discharge its official duty, not by virtue of its responsibility to the municipality, but for the general welfare of the community. The duties discharged are public and governmental. As a result no action will lie against a municipality for the acts of the board unless given by statute.¹ And it is not material whether the members of a board of health derive their appointment directly from the State or are appointed or designated by the municipal government in pursuance of its charter.²

see *Kissell v. Anderson*, 73 Ind. 485; *Coulter v. Coulter*, 81 Ind. 542; *Peck v. Board*, 87 Ind. 221. In *Town of Montgomery v. County of Le Sueur* (1884), 32 Minn. 532, it was held that the liability and duty of the county to pay for "nurses, medical attendance and other necessary expenses" provided by a town in which small-pox had appeared, through the action of its board of health, made a proper charge in favor of towns against the county in which they are situate, by statute, did not at all depend upon the towns having paid or issued its orders for them. The fact that the town had provided them was all that was necessary to entitle it to present its claim to the county for allowance and payment. In *People v. New Lots Auditors* (1884), 34 Hun, 336, it was held that the town must pay, irrespective of any action of the county supervisors, whose duties respecting registration are independent of those of the board of health, the expense incurred under the New York statute which imposed on town boards of health the duty of

supervising and making complete the registration of births, marriages and deaths, and made the expense a town charge.

¹*Bryant v. City of St. Paul* (1885), 33 Minn. 289; s. c., 8 Am. & Eng. Corp. Cas. 201, in which it was sought to charge the city for the misfeasance or negligence of its board of health or its agents in leaving a vault upon private premises exposed and open after removing its contents, in consequence of which plaintiff had, by falling into the vault, sustained personal injuries. See, also, *Fisher v. Boston*, 104 Mass. 87; *Hayes v. City of Oshkosh*, 33 Wis. 314; *City of Richmond v. Lang*, 17 Gratt. 375; *Maximilian v. Mayor*, 62 N. Y. 160; *Ogg v. City of Lansing*, 35 Iowa, 495; *Welsh v. Village of Rutland*, 56 Vt. 228; *Findley v. Salem*, 137 Mass. 171; *Condict v. Mayor*, 46 N. J. Law, 157; s. c., 19 Cent. L. J. 213; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402.

²*Bryant v. City of St. Paul*, 33 Minn. 289.

§ 1011. **The same subject continued.**—The reason why a city should not come within the rule in which the maxim *respondeat superior* applies was stated in a New York case as follows:—"In the first place the board of health is elected by the common council of the city; they hold their position during the pleasure of the common council. The common council can hold them responsible for the manner in which they discharge their trust by removing them in case of failure to discharge it properly. So far they are also brought within the rule, but the council must also be able to control them in the discharge of their duties, and those duties must relate to the exercise of corporate powers and for the peculiar benefit of a corporation in its local or special interest. In the first place the council has not power to control them in the discharge of their duties, for a portion of those duties at least are prescribed by the general statutes of the State. In the second place the duties devolving upon the board of health do not relate to the exercise of corporate powers, neither are their duties for the benefit of the corporation in its local or special interest. Their duties relate to the preservation of the health of the public; the individuals residing in the city may be benefited by the faithful discharge of the duties of officers; so may the public at large. The duties of such officers are, therefore, public in their nature, and they should be regarded as the servants and agents of the public instead of the corporation."¹

§ 1012. **Personal liability of members of board of health for negligence.**—In Texas an action was brought against the individuals composing the board of health and the mayor and marshal of a city for causing the death of another under the statutes of that State by reason of the negligent manner in which they caused to be removed to a pest-house a child suf-

¹ Haight, J., in *Bamber v. City of Rochester* (1882), 63 How. Pr. 103. See, also, *O'Meara v. Mayor &c.*, 1 Daly, 425; *Smith v. City of Rochester*, 76 N. Y. 506; *Jewett v. City of New Haven*, 38 Conn. 368; s. c., 9 Am. Rep. 382, 391; *Hafford v. City of New Bedford*, 16 Gray, 297; *Ham v. Mayor &c.*, 70 N. Y. 459; *Mead v. New Haven*, 40 Conn. 72; *McCoy v. City of Buffalo*, 9 Hun, 401; *Same v. Same*, 74 N. Y. 619; *Lorillard v. Town of Monroe*, 11 N. Y. 392; *Pollock's Adm'rs v. Louisville*, 13 Bush, 221; *Mitchell v. City of Rockland*, 52 Me. 118.

fering from small-pox. The Court of Appeals reversed a judgment in the court below in favor of the defendants and remanded the case for a new trial. While upholding the rights of a city council acting under legislative authority to enact and enforce an ordinance providing for the removal from the city limits of persons afflicted with contagious diseases, the court held that in removing such persons, when their continuance in the city was incompatible with the safety of the inhabitants, the city and those to whom she intrusted this duty were bound to make every reasonable provision for the safety of the diseased persons. And if city authorities cause the removal of a person afflicted with contagious disease, and in doing so fail to exercise the care and precaution the circumstances demand, and death results, they are responsible, even though acting under a city ordinance.¹

§ 1013. The same subject continued.—In a Connecticut case, the Supreme Court of that State construed the statute providing that the board of health in every town shall have “all the power necessary and proper for preserving the public health and preventing the spread of malignant diseases,” and that it shall be their duty “to examine into all nuisances and sources of filth injurious to the public health, and cause to be removed all filth found within the town which in their judgment shall endanger the health of the inhabitants.” Their ruling was that the members of a board of health, acting in good faith and with reasonable caution, were not liable for an error in judgment in causing the removal as a nuisance of property which they believed to be the cause of the prevalence of a malignant disease. The board had the right to remove such property as a nuisance injurious to public health, though not of the character of filth. Nor did it make any difference that the board at the time of the

¹ *Aaron v. Broiles* (1885), 64 Tex. 316. The court held a charge to the jury erroneous, in which they were told that the board of health, while acting under the city ordinances in devising plans to protect the city against disease, were acting in a judicial capacity and were not respon-

sible for errors and mistakes of judgment. They said:—“There was nothing judicial in the act of removing this woman and child, and the question is not whether the policy was wise or unwise, but whether there was a wrong done in one of the details of its execution.”

actual removal was composed of different members from those who composed it when the order was issued for its removal. The action of the board in deferring the removal to a winter month, when the disease had ceased to be prevalent, though ordered in a summer month, did not make its removal illegal, as its earlier removal would have been attended with danger of an increase of its noxious influence, and the removal when made being regarded as necessary to prevent a recurrence of the disease in the following summer.¹

§ 1014. Quarantine regulations generally.—The question has been made in courts of our States as to the power of municipal corporations to pass laws known as quarantine laws, intended to prevent the introduction of infectious or contagious diseases into our communities. The result of the adjudications has been to assert the undoubted power of the State to guard and protect the health and lives of its citizens by such legislation as it may deem proper and suitable for that purpose. This power the State may delegate to the municipal corporations which have been created by the legislature proper, or by the general laws enacted for the incorporation of such bodies. Under the powers thus delegated to the various municipalities they may adopt such regulations as to vessels coming into their ports, or as to trains running upon the various railways entering their borders, or persons coming from infected districts, which will result in the temporary control of the property involved, or the detention and *quasi*-imprisonment or restraint of the persons affected, without infringing upon any of the property or personal rights which are guarantied by constitutional provisions.²

¹ Raymond v. Fish (1883), 51 Conn. 80, an action to recover of defendants damages for having removed brush with oysters growing upon it from a stream within the town, which was defended on the ground that the removal was under an order of the board of health of the town, the brush having been condemned as a nuisance, and that in removing it they did nothing that was not necessary to do to remove the nuisance.

The board of health had acted upon their judgment and the advice of the State board of health, because of the presence of scarlet fever and diphtheria which they attributed to the noxious influences of an oyster bed.

² Metcalf v. St. Louis, 11 Mo. 103; St. Louis v. McCoy, 18 Mo. 238, holding such acts were not repugnant to the constitutional provision as to commerce between the States. St. Louis v. Boffinger, 19 Mo. 13; Mitch-

§ 1015. **Extent of power of municipal authorities.**—The governing authorities of a city empowered by its charter to pass all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances, and prevent the introduction of contagious diseases within the city and within a limited distance of the same, are within those limits clothed with all the legislative power which the legislature could exert. These authorities are the exclusive judges of the degree of necessity of municipal legislation to secure the objects named; and the means and manner contributing to preserving the health of the city and preventing infectious or contagious diseases being brought within the limits prescribed in the statute are entirely within their discretion. In establishing a quarantine they may impose penalties, or cause a vessel and all persons on board to be taken possession of and controlled until their disinfection is effected, and impose on the captain, owner or consignee reimbursement of all expenses incurred, or they may adopt at the same time both of these remedies. If the health officer of a city, on whom the duty of disinfection is imposed by the ordinances of the city or the statutes of the State, in causing expenses to be incurred acts *bona fide* within the limits of a sound discretion and with reasonable skill and judgment in the discharge of his official duties in this respect, the reasonable expenses thus incurred by him must be paid by the captain, owner or consignee of the disinfected vessel, as declared by the ordinances or statutes on the subject.¹

§ 1016. **Liability of owner of vessel for quarantine expenses.**—A health officer in his disposition of persons on board of an infected ship under the ordinances of a city or the statutes must send the persons laboring under the infectious disease to the hospital, and may also send those on board

ell v. Rockland, 41 Me. 363; s. c., 45 Me. 496.

¹ Harrison v. Mayor &c. of Baltimore (1843), 1 Gill (Md.), 264, in which the Court of Appeals held that the court below properly refused a prayer of defendant to instruct the jury that the recovery of the city

"must be limited to the amount of expenses absolutely necessary to preserve the health of the city, or to prevent the introduction of small-pox," on the ground that the right of the city to recover was neither dependent on any such occurrences nor confined to any such restrictions.

the same vessel liable to be affected by it to the hospital, if in his opinion such course is necessary to prevent the spread of the disease. And the health officer, as long as he acts with reasonable skill and judgment, and with a sound and honest discretion in relation to persons not apparently afflicted with the disease, renders the owner, master or consignee of a vessel also liable for the reasonable expenses incurred as in case of those sent to the hospital.¹

§ 1017. Power and duty of board of health under Florida quarantine laws.—The statutes of Florida relating to quarantine have been construed not to establish of themselves a quarantine at any place or in any county, but to leave it to the boards of health to establish the same, when in their judgment it is expedient for the public welfare to do so. And the quarantine regulations which the latest act authorizes a board of health to make are not operative, nor to be obeyed as such, except during the existence of a quarantine duly established by a board of health in accordance with the statutes; and whenever either of the statutes which control in these matters has regulated any matter of quarantine, any regulation inconsistent therewith made by a board of health is of no effect.²

¹ *Harrison v. Mayor &c. of Baltimore* (1843), 1 Gill (Md.), 264, an action by the city authorities against the consignee of a vessel for expenses incurred by the city's representatives during the quarantine of the vessel. The Court of Appeals of Maryland held an instruction to the jury "that if they find the expenses incurred and claimed in this action were not necessary to preserve the health of the city, and not necessary to prevent the introduction of the small-pox by or through the instrumentality of the vessel, the persons, baggage or articles on board her," then the plaintiff cannot recover; and then adding, "that the recovery must be limited to such amount of expenses as in the opinion of the health officer was necessary to disinfect the vessel, cargo

and passengers of said disease and to prevent their propagating the same," erroneous because difficult to reconcile the two parts of the instruction so given, or to discover what was the instruction the court designed to give. See, also, *Provincetown v. Smith*, 120 Mass. 96; *Train v. Boston Disinfecting Co.*, 144 Mass. 523. Cf. *New Orleans v. Ship Windermere*, 12 La. Ann. 84.

² *Ex parte O'Donovan* (1888), 24 Fla. 281; S. C., *sub nom. O'Donovan v. Wilkins*, 4 So. Rep. 789, holding invalid a regulation of the board of health purporting to be operative notwithstanding the absence of the establishment of quarantine by the board, and assuming to regulate in a different manner from that prescribed in the statute the detention of vessels in

§ 1018. Charges against vessels in quarantine.—The latest Florida act, taken by itself alone, does not, by virtue of the general powers it confers on county boards of health, authorize charges to be made against a vessel for quarantine purposes. But construing this act with the former ones which are *in pari materia*, and having in view one object, the county boards of health are authorized to make charges against a vessel for quarantine services if, under the authority given by the statute which has reference to inspection of vessels by the port inspector and fumigation and disinfection of vessels, he deems it necessary, and they have made proper provisions for such disinfection.¹

§ 1019. A limitation upon quarantine regulations.—The Supreme Court of Mississippi has defined the powers of a town under its charter authorizing it to establish and enforce quarantine as follows:—"The town may quarantine in cases de-

the matter of their examination as to whether they are subject to quarantine. In this case of *habeas corpus* the relator, an inspector of customs who had boarded a vessel to see her manifest as ordered by his superior, and who had been committed to jail under charges for violating quarantine regulations, was ordered discharged. The court said as to the duty of boards of health in establishing quarantine:—"The authority implies the duty; and the duty to establish, when it is expedient for the public welfare, implies the corresponding one not to establish and to abrogate one already established when the public welfare does not require any."

¹ Ferrari v. Board of Health (1888), 24 Fla. 390; s. c., 5 So. Rep. 1, in which the court held a reasonable charge according to tonnage of the material for the use of a crib erected by the board of health for receiving ballast to be proper where the discharge of the ballast was for the purpose of disinfection, but that it was

not proper to base any charge on the tonnage of the vessel. See, also, as to charge being illegal when not authorized by statute directly, or through power given to the board of health by statute to make them, Wright v. Chicago, 20 Ill. 252; Corporation of Columbia v. Hunt, 5 Rich. (Law R.) 550; Mayor &c. of Annapolis v. Harwood, 32 Md. 471. As to the tonnage tax being in violation of the constitution of the United States, State Tonnage Cases, 12 Wall. 204; Peete v. Morgan, 19 Wall. 581; Cannon v. New Orleans, 20 Wall. 577; Inman Steamship Co. v. Tinker, 94 U. S. 238. As to charges, so far as made for compulsory service,—as for fumigation,—being authorized by law, in that the system of quarantine laws established by the statute of a State is a rightful exercise of the police power for the protection of health, not forbidden by the constitution of the United States, see Morgan Steamship Co. v. La. Board of Health, 118 U. S. 455.

manding that extraordinary measure, in seasons of epidemic, in the interest of public health; but to justify the exercise of this power there must be apparent necessity for so doing. In such cases regulations unpleasantly or injuriously affecting the individual may be properly employed to accomplish the general safety. But in the absence of any epidemic apparently requiring the use of quarantine regulations and regulations restraining trade temporarily, the exercise of such power may become unreasonable and oppressive.”¹

¹ *Town of Kosciusko v. Slomberg* (Miss., 1891), 9 So. Rep. 297, in which, upon the principles of the text, the court held an ordinance of the town prohibiting the bringing of second-hand clothing into the town, or exposing it for sale therein, without furnishing proof to the mayor that it did not come from an infected district, was an invalid exercise of the town's power in such matters, and an unreasonable restraint of trade.

CHAPTER XXVI.

SUPPRESSION OF NUISANCES.

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| <p>§ 1020. Nature of the power of public authorities to suppress nuisances.</p> <p>1021. The same subject continued — A police power.</p> <p>1022. Abatement of nuisances by destruction of property.</p> <p>1023. The same subject continued — Constitutional limitation.</p> <p>1024. Discretion of municipal bodies in regulating and abating nuisances.</p> <p>1025. The power of municipal corporations as to declaring what is a nuisance.</p> <p>1026. The extent of the power to abate nuisances.</p> <p>1027. Abatement of decayed and noisome tenement houses.</p> <p>1028. Removal of occupants — Express authority or extraordinary peril.</p> <p>1029. Power to define nuisances not absolute.</p> | <p>§ 1030. The same subject continued.</p> <p>1031. Limitation of power to define nuisances further illustrated.</p> <p>1032. Municipality confined to mode prescribed in the charter or statute.</p> <p>1033. The same subject continued.</p> <p>1034. Abatement of structures endangering public safety.</p> <p>1035. Person charged with maintaining a nuisance entitled to notice or hearing.</p> <p>1036. Construction of statutes requiring notice to owners to remove nuisances.</p> <p>1037. Proceedings in equity for abatement of nuisances — New Jersey decisions.</p> <p>1038. The same subject continued — Minnesota decisions.</p> <p>1039. The same subject continued — The rule in other States.</p> |
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§ 1020. Nature of the power of public authorities to suppress nuisances.—The power to abate or suppress nuisances has been generally conceded to the governing authorities of municipal corporations in the discharge of the function of caring for and guarding the public health. Sometimes it has been contended that the rule that by the common law a private person has the right to abate a private nuisance that does him harm without resort to the courts for redress, but that in such case he abates it at his peril, should govern in cases where municipal authorities summarily abate a nuisance. These authorities act, however, under statutes which confer upon them powers to that end, and there would be but little protection to com-

munities threatened by malignant diseases if they were left to their rights at common law. As to the exercise of this power, the Connecticut Supreme Court, in considering a case involving the right of a local board of health to remove a nuisance which it deemed to be the cause of a malignant type of disease in the community, and sustaining the statute which it was urged was unconstitutional in that it took away the right of trial by jury, deprived the owner of his property without due process of law, besides conferring judicial powers upon a tribunal not warranted by the constitution, and took private property for public use without compensation, expressed well the reason for such powers being given to those boards. "By the common law a party has the right to defend himself from any assailant, even to the taking of life when necessary, and even to the taking of life when not necessary in fact but apparently so. If life may be protected by destroying life when apparently necessary but not so in fact, may not life be protected by destroying property when apparently necessary, though afterwards discovered not so in fact? But it may be said that this right of self-defense comes when the assailed party seems to be driven to the last extremity. So here, the justification of the board of health in the destruction of property must come in *seemingly* extreme cases, where there is reasonable ground to believe that immediate action is necessary for the preservation of the life and health of the inhabitants, and where there is reasonable ground to believe the supposed nuisance to be one of fact."¹

§ 1021. The same subject continued — A police power.— To regulate and abate nuisances is one of the ordinary functions of the police power of the State.²

¹ *Raymond v. Fish* (1883), 51 Conn. 80, 99.

² *Fertilizing Co. v. Hyde Park* (1878), 97 U. S. 659, in which the United States Supreme court on writ of error affirmed the holding of the State Supreme Court of Illinois, that it was in the power of the village, the charter of which expressly authorized its trustees to "define or abate nuisances which are or may be in-

jurious to the public health," with still other large powers looking to the same object, to ordain that this manufacturing company should not transport its offal through the streets of the village under penalties for violation of the ordinance, and the refusal of the court to enjoin the further prosecution of the employees of the company for such violations. See, also, *Coates v. Mayor &c. of*

§ 1022. Abatement of nuisances by destruction of property.—The legislature may confer the power upon municipalities to condemn as nuisances all buildings, cisterns, wells, privies and other erections within their limits which, on inspection, shall be found to be unhealthy, and cause the same to be abated. Such legislation is not inhibited by constitutional provisions that no man's property shall be taken or applied to public use without the consent of his representatives, or without just compensation being made therefor. Such inhibitions have no application as a limitation of the exercise of those police powers which are necessary to the safety and tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.¹ It is not the delegation of a new or an extraordinary power to authorize municipal corporations to abate nuisances by removing or destroying the thing which creates it. Without a special grant of authority public corporations may, as a common-law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated may destroy the thing which creates it.²

New York, 7 Cowen, 585, a suit to recover a penalty for interment of a dead body in Trinity church yard, in which the court sustained the validity of an ordinance of the city of New York, passed to prevent the interment of dead bodies within the city, holding that "the act under which it was passed was not unconstitutional, either as impairing the obligation of contracts or taking property for public use without compensation, but stands on the police power to make regulations in respect to nuisances." They further said:—"Every right, from absolute ownership in property down to a mere covenant, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity,

and that it must yield to by-laws and other regular remedies for the suppression of nuisances." *Brady v. Weeks*, 3 Barb. 157; *Russel v. Mayor of New York*, 2 Denio, 461; *American Print Works v. Lawrence*, 23 N. J. Law, 590.

¹ *Theilan v. Porter* (1885), 14 Lea, 622; s. C., 52 Am. Rep. 173, an action of trespass against a taxing district and its legislative council and officers for damages for destroying the dwelling-house of plaintiff, which was successfully defended on the ground of its rotten and tumble-down condition, and that it was unsatisfactory by reason of its filthiness and rotten condition, and therefore a nuisance to be abated. See, also, *Sedgwick on Const. Law*, 434-5; note on pp. 435-6; *Sedgwick on Stat. & Const. Law*, 438-9; *Shaw, C. J., in Commonwealth v. Alger*, 7 Cush. 53, 84, 85, 86.

² *Baumgartner v. Hasty* (1884), 100 Ind. 575; s. C., 50 Am. Rep. 830, hold-

§ 1023. Same subject continued — Constitutional limitation.— The constitutional rights of property owners as against the summary proceedings of boards of health and similar bodies was illustrated in a recent case in Massachusetts where it was held that under a statute which authorized the summary killing of animals having the farcy or glanders, upon condemnation by the cattle commissioners, with no provision for compensation to the owner, the adjudication by the board was not conclusive; and an order issued by them for killing an animal not in fact infected was held to be no defense to those executing the order in a subsequent action by the owner for compensation.¹

§ 1024. Discretion of municipal bodies in regulating and abating nuisances.— One of the chief functions of the police power is to regulate and abate nuisances. This power belongs primarily to the State, but may be, and is, in our States, in large part delegated to municipalities. Its exercise extends to the entire property and business interests within their jurisdiction. In the language of Judge Dillon:—"Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or

ing that a city might summarily tear down a wooden structure erected within prohibited fire limits, and dangerous on account of fires. See, also, *Lodie v. Arnold*, 2 Salk. 458; *Hart v. Mayor*, 9 Wend. 571; s. c., 24 Am. Dec. 165; *Viner's Abridg.*, title Nuisance; 1 *Hawkins' P. C.*, ch. 32, § 12; 3 *Black. Com.* 5; *Broom's Com.* 222; *Cooley on Torts*, 46; *Northrop v. Burrows*, 10 Abb. Pr. 365; *Jones v. Williams*, 11 M. & W. 176; *Lanfear v. Mayor*, 4 La. 97; s. c., 23 Am. Dec. 477; *Harvey v. De Woody*, 18 Ark. 252; *Ferguson v. City of Selma*, 43 Ala. 398; *People v. Vanderbilt*, 28 N. Y. 396; *State v. Flannagan*, 67 Ind. 140; *City of Indianapolis v. Miller*, 27 Ind. 394; *Grove v. City of Fort Wayne*, 45 Ind. 429; s. c., 15 Am. Rep. 262; *Wood's Law of Nuisance*, § 109.

¹ *Miller v. Horton* (1891), 152 Mass. 540 (by a divided court):—"Within limits it [the legislature] may enlarge or diminish the number of things to be deemed nuisances by the law, and the courts cannot inquire why it includes certain property, and whether the motive was to avoid investigation. But wherever it draws the line, an owner has a right to a hearing on the question whether his property falls within it. . . . It would seem doubtful, at least, whether actual necessity ought not to be the limit when the question arises under the constitution between the public and an individual." *Salem v. Eastern R. Co.*, 98 Mass. 431, commented on; and *Train v. Boston Disinfecting Co.*, 144 Mass. 523, distinguished.

unwarrantably invade private rights, or clearly transcend the powers granted to them.”¹

§ 1025. The power of municipal corporations as to declaring what is a nuisance.—The Supreme Court of Colorado has construed the language of a charter of a city empowering it “to make regulations to secure the general health of the inhabitants, to declare what shall be nuisances and to prevent and remove the same,” to clothe the city “with authority to declare, by general ordinance, what shall constitute a nuisance. That is to say, the city may by such ordinance define, classify and enact what things or classes of things, and under what conditions and circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might under such authority declare by ordinance that slaughter-houses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes and the like piled up or remaining for a certain length of time on the sidewalks, or other things injurious to the health, or causing obstructions or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination.”²

¹Dillon on Munic. Corp., § 379. In *Durham v. City of New Britain* (1887), 55 Conn. 378; s. c., 11 Atl. Rep. 354, the Supreme Court of Connecticut held an ordinance of the city council, passed under power given it by statute to better protect and preserve the waters of a lake, the source of its water supply, prohibiting sailing of boats upon its surface and fishing therein, to be a proper and valid exercise of the police power of the State; and this notwithstanding the grantors of the property to the water commissioners had in the grant a reservation to themselves of a right to sail upon and fish in the lake. In *Philadel-*

phia v. Providence Trust Co. (1890), 132 Pa. St. 224; s. c., 18 Atl. Rep. 1114, the Supreme Court of Pennsylvania held that under the power of the board of health of the city, given by statute, “to remove the cause of all nuisances that now exist or may be hereafter created,” the board could require privy wells to be cleaned and purified; but they had no power to demand the construction of water-closets and connections, and, on failure of the owners to comply, to construct such for the city and charge the cost to the owners of the premises. See, also, *Kennedy v. Board of Health* (1845), 2 Pa. St. 366.

²*City of Denver v. Mullen* (1884), 7

§ 1026. The extent of the power to abate nuisances.—If municipal authorities are clothed with power under charter of the corporation upon a report of its board of health to abate nuisances, they may abate a nuisance summarily. But when proceeding thus summarily they do so at their peril, and if the owner can establish the fact that the property destroyed was not a nuisance, he may recover from the municipality any damages he may have sustained.¹

§ 1027. Abatement of decayed and noisome tenement houses.—A city charter provided that its "city council shall have power to prevent and cause the removal of all nuisances within said city, such as all decayed and dilapidated houses or structures calculated to produce disease of any kind, or unfit for use or habitation, and things producing noxious smells in frequented parts of the city, and things producing unhealthy exhalations and prejudicial to the health of the city, and

Colo. 345, 353. See, also, *Everett v. Council Bluffs*, 40 Iowa, 66; *Yates v. Milwaukee*, 10 Wall. 497. In *Chicago &c. R. Co. v. City of Joliet* (1875), 79 Ill. 25, an action by the city to enjoin a railroad company from running its trains through the public streets and over certain "public grounds" of the city, which the city council by ordinance had declared to be a nuisance, the Supreme Court of Illinois reversed the court below, which had granted an injunction, and remanded the case with directions to dismiss the bill, declaring that they would regard the ordinance as without effect upon the case, although the charter conferred upon the common council the power to abate and remove nuisances and to punish the authors thereof, and to define and declare what shall be deemed nuisances, upon the authority of *Yates v. Milwaukee*, *supra*, and *State v. Jersey City*, 29 N. J. Law, 170.

¹ *Mayor &c. of Americus v. Mitchell* (1887), 79 Ga. 807; s. c., 5 S. E. Rep. 201, in which it was further held that it

was error to grant an injunction to restrain the city authorities from destroying a dam within the limits of the city which had already been washed away by floods and where the pond which the authorities prepared to abate as a nuisance had been destroyed. In *State v. Franklin* (1888), 40 Kan. 410; s. c., 19 Pac. Rep. 801, it was held that under the provision of the laws of Kansas as to cities which gives the city councils authority to "purchase or condemn and hold for the city within or outside the city limits, within five miles therefrom, all necessary lands for hospital purposes and water-works," and "that the police jurisdiction of the city shall extend over such lands and property to the same extent as over public cemeteries," the words "such lands" refer only to those proper and necessary for hospital purposes and water-works, and there is no power in the city to abate a nuisance within five miles of its limits except it be upon those of particular lands.

things calculated seriously to impair the comfort and convenience of the inhabitants of the city." The Supreme Court of Alabama construed this provision of the charter to clothe the corporate authorities of the city with the amplest powers to protect the "health" and peace and "comfort" of its inhabitants — an authority well conferred upon it by the legislature. But even without such special authority, those powers are incident to all incorporated towns and cities, as a means of discharging the duty to abate all nuisances which hurt, inconvenience or damage its inhabitants, or any particular portion of them.¹ The court sustained the chancellor in refusing an injunction to restrain the city authorities from removing tenements which the proof showed to be two old and almost worthless houses, filthy and crowded with filthy tenants, and that they were injurious to the health and comfort of the neighborhood, and had been occupied by patients afflicted with the small-pox, and that they were in an improving and flourishing part of the city, and that the owner was able to repair and improve them, but failed to do so.²

§ 1028. Removal of occupants — Express authority or extraordinary peril.— The power of the board of health to abate nuisances and the causes of them and to enforce sanitary regulations is very great, and the courts never interfere with the legitimate use of their power, but excuse an excessive exercise of the power when there is great peril of the public health. When, however, they claim to remove citizens from their homes, and close up their houses, they must have either the sanction of law for it, or they must be justified by great public necessity, which demands such action — upon the same principle that buildings may be blown up to prevent the spread of a great conflagration. "The law looks with too jealous an eye upon the right of every man to the peaceful possession of his house, his castle, the dwelling place of himself and family, to permit him to be ejected from it, except in a clear case of right."³

¹ *Ferguson v. City of Selma* (1869), 43 Ala. 398; *Ex parte Burnett*, 30 Ala. 461, 465.

² *Ferguson v. City of Selma* (1869), 43 Ala. 498.

³ *Eddy v. Board of Health*, 10 Phila. 94, where the court holds, in effect, that except in extraordinary emergencies there is no constitutional right to enter dwelling-houses to

§ 1029. Power to define nuisances not absolute.— Though a city may have the power under its charter to abate nuisances, and also the extraordinary power to define and declare what is a nuisance, which is broader than its general authority to abate, neither will justify a wanton declaration that an act or vocation is a nuisance which unquestionably is not, or an unwarrantable invasion of private rights.¹

§ 1030. The same subject continued.— While the legislature in the exercise of the police power may prohibit in particular localities such use of property as is injurious to public health, it has no authority to declare or to authorize municipal authorities to declare the building of a private residence on one's land to be a nuisance because the same may have a tendency to depreciate the value of adjoining property by shutting out the breeze from a body of water and obstructing the view to the sea, as it would virtually deprive the owner of the use of his property without compensation.²

search for nuisances, without a search-warrant therefor.

¹ *City of Kansas v. McAleer* (1888), 31 Mo. App. 433, in which case the appellate court reversed the criminal court below and sustained the validity of an ordinance of the city declaring it a nuisance and prohibiting "the running or operating of a rock-crushing machine in any block or square wherein there are three or more residences or dwellings occupied." Among other things the appellate court held that the fact that the machine was in operation at the place charged before the passage of the ordinance was of no avail as a defense. On this point see, also, *Hayden v. Tucker*, 37 Mo. 214; *Campbell v. Seaman*, 63 N. Y. 568; *Wier's Appeal*, 74 Pa. St. 230; *Coates v. Mayor*, 7 Cowen, 585. Nor would the fact that the most modern appliances were made use of and that the offensiveness and annoying character of the machine were thereby

reduced to the minimum be a defense. *State v. Bull*, 59 Mo. 321.

² *Quintini v. Board &c. of Bay St. Louis* (1886), 64 Miss. 483; s. c., 1 So. Rep. 625, in which case it was also held that, where a particular use of property is declared by a municipal ordinance to be a nuisance and also a crime, the chancery court still has jurisdiction to grant the owner an injunction against a suppression of the alleged nuisance, although its effect be to protect the owner from a criminal prosecution under such ordinance. In *Ex parte O'Leary* (1887), 65 Miss. 80; s. c., 3 So. Rep. 144, the Supreme Court of Mississippi held an ordinance of a municipality declaring it a nuisance "to erect hog-pens within any inclosure in the city limits, or to permit hogs to run at large within any lot or inclosed place in the city," except at certain designated places, and directing that all such lots and pens be abated as nuisances, to be invalid as being too

§ 1031. Limitation of power to define nuisances further illustrated.—While authority to prevent and abate nuisances may be constitutionally conferred on a municipal corporation, such power, conferred in general terms, cannot be taken to authorize extra-judicial condemnation of that as a nuisance which, in its nature or use, is not such.¹

§ 1032. Municipality confined to mode prescribed in the charter or statute.—In Iowa, where the statute empowers cities to prohibit the erection within certain limits of wooden

broad and sweeping. See *Wood on Nuisances*, § 518. So in *Town of Arkadelphia v. Clark* (1889), 52 Ark. 23; s. c., 11 S. W. Rep. 957, an ordinance of the town prohibiting the owning, keeping or raising of bees within the corporate limits was held by the Arkansas Supreme Court to be too broad, and therefore invalid. The court said:—"Neither the keeping, owning or raising of bees is in itself a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case. The ordinance under consideration undertakes to make each of the acts named a nuisance without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city."

¹ *Poyer v. Village of Des Plaines* (1885), 18 Ill. App. 225, adhered to in *Village of Des Plaines v. Poyer* (1887), 22 Ill. App. 574, in which an ordinance of the village declaring all picnics to be nuisances regardless of their character was held to be invalid upon the principle announced in the text. In *People v. Gordon* (1890), 81 Mich. 306; s. c., 45 N. W. Rep. 658, the Supreme Court of Michigan held a requirement by the common council of a city that garbage shall be removed through and out of the city in water-tight, closed carts or wagons, marked "garbage," to be

a reasonable regulation. In *City of St. Paul v. Gilfillan* (1886), 36 Minn. 298; s. c., 31 N. W. Rep. 49, the Supreme Court of Minnesota held an ordinance of the city declaring the emission of dense smoke from the smoke-stack of any boat or locomotive, or from any chimney, anywhere in the city, a public nuisance, void and unauthorized, as the charter of the city nowhere gave it power to declare what acts or omissions shall constitute a nuisance. The court distinguished *Harman v. City of Chicago*, 110 Ill. 400, 411, which sustained a prosecution under a similar ordinance of that city, in that the city council there were expressly authorized by the legislature "to declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue or suffer nuisances to exist." The Minnesota court further said:—"It will not be assumed that the legislature may authorize that to be declared a nuisance which, from the nature of the case, is not and cannot become such. But the matter prohibited by this ordinance may become a nuisance, and may therefore be the proper subject for regulation or restraint by the city council under legislative sanction." See *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207.

buildings on petition of the owners of two-thirds of the ground embraced within those limits, this petition is a necessary prerequisite to legalize such a prohibition.¹ The reason is, as expressed by the Supreme Court of Iowa in another case, that "when a thing is directed to be done through certain means, or in a particular manner, there is implied an inhibition upon doing it through other means or in a different manner."² The rule is well settled that a municipal corporation has the power to treat as a nuisance a thing that from its character, location and surroundings may and does become such. The Supreme Court of Illinois, discussing this general subject, said:—"But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general grant of power like the one we are considering, their action under such circumstances would be conclusive of the question."³

§ 1033. The same subject continued.—The United States Supreme Court, in discussing the limits of power, said:—"It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws, either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."⁴

¹ *City of Des Moines v. Gilchrist* (1885), 67 Iowa, 210.

² *City of Keokuk v. Scroggs*, 39 Iowa, 447.

³ *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 207; s. c., 44 Am. Rep. 788.

⁴ *Yates v. Milwaukee*, 10 Wall. 505. See, also, *Hart v. Mayor*, 3 Paige, 213; *Mayor &c. v. Gerspach*, 33 La. Ann. 1011; *Baker v. City of Boston*, 12 Pick. 184; *First Municipality v. Bli-neau*, 3 La. Ann. 689; *Kennedy v.*

Phelps, 10 La. Ann. 227; *Mayor &c. v. Hoffman*, 29 La. Ann. 651. As to ordinances providing for the summary destruction of wooden buildings, see *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Wadleigh v. Gilman*, 12 Me. 403; 2 *Bacon's Abridg.* 147; *Clark v. City of South Bend*, 85 Ind. 276; s. c., 44 Am. Rep. 13; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 669; 2 *Kent's Com.* 339; *Fields v. Stokeley*, 99 Pa. St. 306; s. c., 44 Am. Rep. 109; *Republica v. Duquet*, 2

§ 1034. Abatement of structures endangering public safety.—A municipality may, with the strong hand, abate a public or common nuisance which endangers either the health or the safety of its citizens.¹ But a railway track laid upon a city street in good faith under a corporate charter granted for the purpose, but not endangering the health or safety of the inhabitants, cannot be classed among the nuisances which the city authorities may abate summarily without resort to the processes of the law, even though by reason of the manner of its construction it may obstruct the street to such a degree as to amount to a nuisance.²

§ 1035. Person charged with maintaining a nuisance entitled to notice or hearing.—The question of nuisance can be conclusively decided, for all legal uses, by the established

Yeates, 493; Corporation of Knoxville v. Bird, 12 Lea, 121; City of Salem v. Maynes, 123 Mass. 372; Field v. City of Des Moines, 39 Iowa, 575; s. c., 18 Am. Rep. 46. In Meeker v. Van Rensselaer, 15 Wend. 387, it was held lawful for an officer acting under a board of health to tear down a tenement house cut up into small apartments and calculated to breed disease.

¹ Klingler v. Bickel (1887), 117 Pa. St. 326, in which the Supreme Court of Pennsylvania held that the high constable and his posse of a borough were not liable in damages for the demolition under orders of the town council of the borough of a frame wooden building which was in the course of construction contrary to the provisions of an ordinance of the borough which prohibited the erection of such buildings within the limits in which it was being erected. Another ordinance provided that persons violating the one above referred to "shall be compelled to remove the structure or pay the cost of removal by council with the addition of twenty per centum, and also pay a penalty of fifty dollars for every day

the same shall remain standing within the limits prescribed in this ordinance," etc. The town council ordered its officers with a posse to destroy and remove the structure propose to be erected. The Supreme Court said:—"Every frame building erected in a closely built up portion of a town in violation of a lawful ordinance prohibiting it may be said to be a nuisance, owing to the danger from fire; but it is not such a nuisance *per se* as would justify a private person in abating it. But when it comes to a question of the power of council to abate it and enforce its ordinance, we have an entirely different question before us."

² Eastern &c. Pass. Ry. Co. v. City of Easton (1890), 133 Pa. St. 505; s. c., 19 Am. St. Rep. 658, holding that where the authorities of a city have declared such a track to be in violation of a municipal ordinance and a public nuisance, and have summarily undertaken to remove it by force, and the railway prays for an injunction against such removal, the city not applying by cross-bill or otherwise for a legal adjustment of the differences between the company and it-

courts of law or equity alone, and the resolutions of officers, or of boards organized by force of municipal charters, cannot to any degree control such decision.¹ The power given to the board of health of a town, under the statute of New York which gives to the board of health power "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances," etc., by necessary implication requires such a board to give a reasonable notice to the person charged with maintaining a nuisance that complaint has been made or that such fact exists, to afford him an opportunity to be heard in refutation of the charge.²

§ 1036. Construction of statutes requiring notice to owners to remove nuisances.—The statute of New York requires the board of health to serve an order for the removal of a special nuisance on the occupant and the owner of the premises where the nuisance exists, and, in case of disobedience on their part, authorizes a removal of the nuisance, and makes the expense of the removal of the nuisance by the board a charge on the occupant of the premises. An order to remove such a nuisance, directed to one having an interest in the

self, an injunction should be granted without regard to the merits of the controversy.

¹ *Hutton v. City of Camden* (1876), 39 N. J. Law, 122, in which case the action of a board of health, finding that a nuisance existed on a person's property, in the absence of such person, and without notice to him, was void, even when it came collaterally in question. *Tiedeman's Limitations of Police Powers*, 427. See, also, *City of Salem v. Eastern R. Co.*, 98 Mass. 431, an action to recover the expenses of an abatement of a nuisance made by the city under the adjudication of a board of health. In this case the Supreme Court of Massachusetts said:—"But the court are of opinion that in a suit to recover expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same,

but who was not heard, and who had no opportunity of being heard before the board of health, such party is not concluded by the findings or adjudications of that board, and may contest all the facts upon which his liability is sought to be established."

² *People v. Board of Health* (1891), 58 Hun, 595; s. c., 35 N. Y. St. Rep. 411; 12 N. Y. Supl, 561, holding the proceedings in this case fatally defective because of the omission to give notice reasonable in point of time to the relator, a railroad company of which complaint was made. This results from the duties of a board in such matters being of a quasi-judicial nature, and the persons complained of having a right of hearing before a final judgment at common law and under the State constitution.

premises on which it exists, and served on his agent, who is in occupancy of the premises, does not impose upon the agent the duty of removing the nuisance.¹ A statute of Pennsylvania authorizes the board of health of a municipal corporation, after giving notice to the owner of property that from something connected with its construction, or some use of it, it is a nuisance, to remove it or take such action as will cause the nuisance to cease, to have it removed or make such alterations in the property as may be needed to prevent the nuisance. For the expense of this there is given by the statute a right of action on what is styled a municipal claim for lien. In a proceeding to enforce such a claim, it is necessary to aver that notice to remove the nuisance or take the other steps required to abate it was made to the rightful owner.²

§ 1037. Proceedings in equity for abatement of nuisances.

When a board of health proceeds by bill in chancery for an injunction to prohibit the continuance of a nuisance as allowed by the New Jersey statute, a notice is not necessary, as where the boards proceed by summary process to abate nuisances; for in cases of that kind the statute provides that the boards shall give notice of their intention to abate to the owners of the property or those engaged in the business alleged to be a nuisance.³ Under this New Jersey statute only such a nui-

¹ *Lydecker v. Eells* (1888), 3 N. Y. Supl. 323; s. c., 20 N. Y. St. Rep. 886.

² *Philadelphia v. Dungan* (1889), 124 Pa. St. 52; s. c., 16 Atl. Rep. 524; 23 W. N. C. 243. In *Connellsville Borough v. Gilmore*, 15 W. N. C. 343, such a proceeding, the court said: — "A municipal claim being the creature of statute and unknown to the common law must conform to the law of its creation. This claim is radically defective. The act of 1851 only empowers the borough to file such a claim after the default of the owner or occupier to remove the obstruction and after a demand upon him by the borough authorities to do so. Such demand, being a prerequisite, should have been averred in the claim." See, also, *Simons v. Kern*,

92 Pa. St. 455; *Gans v. The City*, 102 Pa. St. 97. In this last case, Trunkey, Justice, said: — "Notice to the owner being a prerequisite, the claim should be filed against the property in the name of the person upon whom notice was served. The law requires the return and registry of the owners of every lot of ground upon the plans of the city, and if so registered the lot shall not be sold for taxes or other municipal claims, except in the name of the owner as returned. Although the proceeding is *in rem*, it is contemplated that the owner's name shall appear in the claim and proceedings thereon."

³ *State v. Neidt* (N. J. Eq., 1890), 19 Atl. Rep. 318.

sance as is hazardous to public health can be abated, and where it simply renders home uncomfortable or depreciates the value of property, or amounts only to an annoyance to individuals or communities, relief must be sought by the individual or the community.¹ The New Jersey statute has been construed not to clothe boards of health with the functions of the attorney-general in cases of public nuisances, but to authorize them in their own names to secure for individuals that protection which equity would afford to those persons upon their own suit. The statute requires, also, that the fact that there exists a special injury which would enable an individual to sue shall appear by the pleadings.²

§ 1038. The same subject continued — Minnesota decisions.—In Minnesota it has been held that a municipal corporation, clothed by its charter with power “to remove and abate any nuisance injurious to the public health,” and “to do all acts and make all regulations which may be necessary and expedient for the preservation of health or the suppression of disease,” may, at its election, in cases falling within some recognized head of equity jurisdiction, resort to a court of equity to aid it in enforcing its public duties to preserve the public health of its inhabitants and maintain in its own name an action to abate a public nuisance within its corporate limits affecting the public health of the municipality.³ A town in

¹ *State v. Neidt* (N. J. Eq., 1890), 19 Atl. Rep. 318, in which case the nuisance complained of was a fat-rendering factory, and the proofs were that more than a dozen persons living in the vicinity were made sick at their stomachs or nauseated by the odors. One was sick for two days, another lost his appetite and on several occasions was unable to eat his meals. One man felt so badly that he was obliged to quit his work. Others refused to work because of the stench. Two were made to vomit, while in others retching was the only effect. A number of families were obliged to stay indoors and close their windows to protect them-

selves from the odors. The chancellor ordered an abatement of the nuisance so far as it was hazardous to the public health. Following *Butterfoss v. State*, 40 N. J. Eq. 325.

² *Board of Health &c. v. New York Horse Manure Co.* (N. J. Eq., 1890), 19 Atl. Rep. 1098, in which the chancellor dismissed the bill because the pleadings did not show such a case.

³ *Village of Pine City v. Munch* (1890), 42 Minn. 342; s. c., 44 N. W. Rep. 197, an action to enjoin the defendants from so operating a dam as to draw off the water of a pond and laying bare the submerged lands at such seasons as to affect injuriously the public health of the vil-

Minnesota may, in its own name, maintain a civil action to abate a public nuisance constituting an obstruction to a highway, and to enjoin its maintenance, as under the statutes of that State the care and maintenance of highways are vested in the towns in their corporate capacity, the supervisors being merely their officers and agents.³ Upon the right of a town to maintain such a suit in equity the Minnesota Supreme Court said:—"A township is a governmental agency to which is intrusted the care and superintendence of highways within its boundaries, and upon which is imposed the duty of repairing them and keeping them in order, and removing obstructions, with power to levy and expend taxes for these purposes. In short, as to all matters pertaining to highways, a town is, to the extent of these powers and duties, the representative of the State, and if it has the power to abate such a nuisance, as it undoubtedly has, there is no apparent reason why it may not, in a proper case, resort to a court of equity to aid it by injunction or other appropriate remedy in the performance of its public duties as a governmental agent of the State."²

§ 1039. The same subject continued — The rule in other States.—It has been held that a municipal corporation cannot maintain an action in equity under the Iowa code to enjoin and abate a nuisance on the ground of injury to its

lage. It was further held that the fact that this dam was erected by authority of law would be no defense to the action if the injury to the public health of the village as a result flowed from the manner of construction or operation of the dam. See, also, as bearing somewhat upon this doctrine, 3 Pomeroy's Eq. Jur., § 1814; *Mayor &c. v. Bolt*, 5 Ves. 129; *City of Rochester v. Erickson*, 46 Barb. 92; *Inhabitants of Winthrop v. Farrar*, 11 Allen, 398; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315; *City of Taunton v. Taylor*, 116 Mass. 254, 262; *Remarks of Bacon, V. C., in Nuneaton Local Board v.*

Sewage Co., L. R. 20 Eq. 127; Mayor &c. v. Marriott, 9 Md. 160, 174.

¹ *Township of Hutchinson v. Filk* (Minn., 1890), 47 N. W. Rep. 255, following *Woodruff v. Town of Glendale*, 23 Minn. 537; *Same v. Same*, 26 Minn. 78; s. c., 1 N. W. Rep. 581; *Peters v. Town of Fergus Falls*, 35 Minn. 549; s. c., 29 N. W. Rep. 586; *Township of Blakely v. Devine*, 36 Minn. 53; s. c., 29 N. W. Rep. 342. As to the equitable remedy in such a case, see *Angel & D., Highw.*, § 280 and notes.

² *Township of Hutchinson v. Filk* (Minn., 1890), 47 N. W. Rep. 255. See, also, *Village of Pine City v. Munch*, 42 Minn. 342; s. c., 44 N. W. Rep. 197.

citizens. . The mode in which it can exercise the "power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated," given it by the general statutes of the State, is by making and publishing ordinances on the subject.¹ But an action of this kind may be maintained under the statutes of Massachusetts by a municipal corporation.²

¹City of Ottumwa v. Chinn (1888), 75 Iowa, 405; s. c., 39 N. W. Rep. 670, an action by the city to enjoin the carrying on of the business of defendants, who were conducting a slaughter-house.

Mass. 254, which was a bill in equity brought in the name of the city by its board of health to restrain the exercise of an offensive trade or employment which the board of health prohibited under the powers given it by the Massachusetts statutes.

²Taunton v. Taylor (1874), 116

CHAPTER XXVII.

PUBLIC IMPROVEMENTS.

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§ 1040. Public improvements generally.—Municipal corporations of the different kinds in our system of government have had expressly conferred upon them by their charters, general statutes or special legislation, or there is implied as an incident to their general purposes, the power to make public improvements of a general kind or local. In a limited sense these have been discussed in previous chapters.¹ These charters or statutes usually prescribe the mode in which these improvements should be provided for by the governing authorities, and also the preliminary steps, where proper, to be taken as precedent to and fully authorizing action of the authorities in the matter. They also, as a protection to the citizens, in most instances provide a mode of letting the contracts for work upon such improvements as may be ordered by advertising for proposals for bids, etc. There will be found in a previous chapter some discussion upon this particular point, besides what may be found here.² The right to impose by statute the cost of local public improvements wholly or partly upon the owners of the property benefited thereby has been questioned at various times, and there will be given here the rulings in different jurisdictions sustaining the power of the legislature. There will also be discussed the rights

¹ See chapter XV, vol. I, on EXPRESS CORPORATE POWERS.

² See chapter XVIII, vol. I, on MUNICIPAL CONTRACTS.

of property owners affected by public improvements to damages resulting from them, as well as from the unskilful manner in which public works are constructed.

§ 1041. Passage of ordinance.—The usual rule that the mode of procedure to be followed in the enactment of ordinances as prescribed by statute must be strictly observed applies to those providing for public improvements. Such statutory powers constitute conditions precedent, and unless the ordinance is adopted in compliance with the conditions and directions thus prescribed it will have no force.¹ The Supreme Court of Ohio held that an ordinance of a municipal corporation to condemn property for the opening and extension of a street, or to improve, by grading, curbing and macadamizing, a street so opened and extended, was an ordinance of a permanent nature within the meaning of that section of the Revised Statutes of Ohio which requires that ordinances of a permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the members elected dispense with the rule, and that the statute was mandatory.²

§ 1042. When power to be strictly construed.—When a municipal corporation seeks to impose upon citizens the burden of making public improvements, and to hold the property of the individual liable therefor, the statute authorizing such improvements to be made at the expense of the citizen must be strictly pursued.³ A South Dakota statute provided that

¹ *State v. Mayor &c.*, 25 N. J. Law, 399; *Blanchard v. Bissell*, 11 Ohio St. 101; *Elizabethtown v. Lefler*, 23 Ill. 90; *Town of Danville v. Shelton*, 76 Va. 325; *Barnett v. Newark*, 28 Ill. 62; *Ewbanks v. Ashley*, 36 Ill. 177; *Herzo v. San Francisco*, 33 Cal. 134; *Welker v. Potter*, 18 Ohio St. 85; *Bloom v. Xenia*, 32 Ohio St. 461, 466; *State v. Bell*, 34 Ohio St. 194; *Fuller v. Heath*, 89 Ill. 296; *Tracey v. People*, 6 Colo. 151; *Lewis v. St. Louis*, 4 Mo. App. 563; *Williams v. Willard*, 23 Vt. 369; *Missouri Pac. R. Co. v. Wyandotte (Kan.)*, 23 Pac. Rep. 950;

McCoy v. Briant, 53 Cal. 250; *Smith v. Buffalo*, 1 Sheld. (N. Y.) 493; *Sauk v. Philadelphia*, 4 Brewst. (Pa.) 133; *Beikman's Case*, 11 Abb. Pr. 164; *Leland v. Long Branch Comm'rs*, 42 N. J. Law, 375; *Van Alstine v. People*, 37 Mich. 523.

² *Campbell v. City of Cincinnati (Ohio, 1892)*, 31 N. E. Rep. 606. See, also, *Hepburn v. City of Philadelphia (Pa., 1892)*, 24 Atl. Rep. 279.

³ 2 *Desty on Taxation*, 1241; 2 *Dillon on Munic. Corp.*, § 769; 1 *Blackw. Tax Titles*, § 612; *Merritt v. Village of Portchester*, 71 N. Y. 309; *Hewes*

when a city council shall deem it necessary to make any of the improvements usual as to its streets, etc., they shall "by resolution declare such work or improvements necessary to be done, and such resolution shall be published for four consecutive weeks," etc.; and it further provides that twenty days shall be allowed within which the property owners may protest, and upon a failure to do so on the part of a majority, the council could contract for the work and assess for the expenses. This statute has been construed to require that the resolution adopted and published should specifically designate the work declared to be necessary to be done; and it has been held that property owners and the property would only be liable for the costs of such improvements as are so specifically designated in the resolution and published in the official paper. This resolution and publication thereof being the only notice required to be given property owners that the improvement is ordered made, the improvements contracted for must conform strictly to the improvements designated in the resolution adopted and published.¹

§ 1043. Petition for improvements.—Under the statutes of Maryland a life tenant cannot bind the property by joining in an application for an improvement along the streets of a city, and cannot be counted as one upon the petition to make a majority of the front-foot owners which is required to justify the council in ordering such improvement.²

v. Reis, 40 Cal. 255; *McLauren v. City of Grand Forks*, 6 Dak. 397; s. c., 43 N. W. Rep. 710; *White v. Saginaw*, 67 Mich. 33; s. c., 34 N. W. Rep. 255; *Hoyt v. City of Saginaw*, 19 Mich. 39; *Pound v. Chippewa County*, 43 Wis. 63.

¹ *Mason v. City of Sioux Falls* (So. Dak., 1892), 51 N. W. Rep. 670, in which the Supreme Court held that after a resolution of a city council had been adopted and published, a change in the work enhancing the cost would require a new ordinance.

² *Mayor &c. of Baltimore v. Boyd* (1885), 64 Md. 10; s. c., 20 Atl. Rep. 1028, an action to enforce an assessment upon property which was de-

fended on the ground that a majority of front-foot owners had not petitioned for the improvement, which defense the property owner is allowed to make in Maryland. See, also, *Henderson v. Mayor*, 8 Md. 352. The Court of Appeals of Maryland, in *Mayor &c. v. Boyd*, *supra*, said, in their reasoning:—"It is true that in the absence, as in our State, of any special legislation on the subject, the life tenant must pay all the ordinary annual taxes levied on the property, and also keep down the interest on incumbrances out of the rents and profits. 2 *Desty on Taxation*, 695; *Burroughs on Taxation*,

§ 1044. **The same subject continued.**—The statute of Michigan provides that highway improvements may be made by the township boards “upon petition of a majority of the resident property holders upon such highway or street.” It has been held by the Supreme Court of that State that where one petition for such an improvement is laid upon the table by the board and a new petition for the same improvement is presented, the names of persons appearing upon the first petition but not upon the second cannot be counted towards making a majority of the resident property holders so as to authorize the ordering of the improvement upon the second petition.¹ And as a guardian of children has no authority to bind the land of those children that he represents, he cannot be counted towards making a majority of the property holders signing such a petition.² And where lands are held by two persons under a contract running to them jointly by name, and only one of them signs the petition, it may be shown by parol that they are husband and wife and therefore hold in joint tenancy; and the husband’s signature alone will not entitle him to be counted to make up a majority.³

223; *Cooley on Taxation*, 298; *Spangler v. York County*, 13 Pa. St. 327; *Varney v. Stevens*, 22 Me. 331. But in case of an assessment for a betterment on real estate the rule would seem to be different. Such betterment is regarded as an incumbrance, to which the tenant for life must contribute to the extent of the interest during his life on the money paid, and at his death the remainder-man must bear the charge of the principal. He must pay the annual interest on the assessment, but the principal is chargeable to the remainder-man. 2 *Desty on Taxation*, 696; *Plympton v. Boston Dispensary*, 106 Mass. 544; *Peck v. Sherwood*, 56 N. Y. 615; *Gillespie v. Brooks*, 2 Redf. Sur. 363. This court has also decided that assessments upon the owner of adjacent property to pay the expenses incident to the paving of streets, though levied in the exercise of the

taxing power, are not “taxes” in the ordinary sense of the term, but are rather “charges” upon the land, inseparably incident to its location in regard to other property. *Mayor &c. v. Proprietors &c.*, 7 Md. 517; *Gould v. Mayor &c.*, 59 Md. 378.”

¹ *Auditor-General v. Fisher*, 84 Mich. 128; s. c., 47 N. W. Rep. 574.

² *Auditor-General v. Fisher*, *supra*.

³ *Auditor-General v. Fisher*, 84 Mich. 128. It was also urged in this case that as the township board had determined that a majority of the property owners had petitioned for the improvement, their judgment was final and conclusive, and could not be collaterally attacked. The court held, however, that in the absence of a statutory provision that such a judgment should be conclusive, the fact whether or not the requisite number of persons have signed a petition or given assent to

§ 1045. **Determination of sufficiency of petition.**—The opening of a street in the city of San Francisco was authorized by a California statute. It provided that on petition to the mayor by the owners of a majority in frontage of the property described in the statute, “as said owners are or shall be named in the last preceding annual assessment roll for the State, city and county taxes,” for the opening of said street, the board constituted by the act to carry it into effect should proceed. There was a petition to the mayor by property owners, and he made and attached a certificate to it that a majority of owners of frontage property on the proposed street had signed it. Upon this the board for opening the street organized and proceeded with their work to the point of reporting finally to the county court as provided in the statute, and that court approving and confirming the report. In an original proceeding for *mandamus* in the Supreme Court of California to compel the supervisors of the corporation to levy a tax for the payment of bonds issued in connection with the opening of that street, the court construed the statute and made these rulings: The signing of that petition by the owners of a majority in frontage of the property was necessary to give the board of public works jurisdiction to organize and proceed with the work; that the mayor was not charged with the duty of determining whether the petition was signed by the required majority, and that his decision to that effect did not conclude or estop any one from disputing and showing that in fact the petition was not signed by the required majority.¹

pave or improve streets, when the power to so pave or improve them depends upon a given number or proportion of the proprietors to be affected, can be inquired into; and that the non-assent may be shown as a defense to an action to collect the assessment. See, also, *Twiss v. City of Port Huron*, 63 Mich. 528; s. c., 30 N. W. Rep. 177; *Mulligan v. Smith*, 59 Cal. 206; *Cooley on Taxation* (2d ed.), 657.

¹ *Kahn v. Board of Supervisors &c.* (1889), 79 Cal. 388; s. c., 21 Pac. Rep.

849; affirmed in 25 Pac. Rep. 403, approving and adhering to *Mulligan v. Smith*, 59 Cal. 206. See, also, *Liebman v. City and County of San Francisco*, 11 Sawyer, 147, where the question of the city not being estopped by action of the mayor or by judgment of the county court is ably discussed by Field and Sawyer, JJ.; *Lent v. Tillson*, 72 Cal. 404. The signatures to the petition of persons other than those to whom the property was assessed in the last preceding assessment roll could not be

§ 1046. **The same subject continued.**— Another California statute provided that certain street grading could not be ordered by the supervisors unless a majority of the frontage of lots petitioned therefor, and certain grading was done upon a petition from which it did not certainly appear whether the petitioners owned a majority of the frontage or not. In such case the Supreme Court held that since the board must necessarily have passed upon the sufficiency of the petition before ordering the work done, it was properly presumed to be sufficient, and testimony to the contrary was rightly excluded.¹

§ 1047. **Rule of strict construction illustrated.**— The Ohio statutes as to public improvements by cities and the assessment of owners of land adjoining for the cost of the same provides that the proceedings with respect to public improvements by municipal corporations “shall be strictly construed in favor of the owner of the property assessed or injured, as

counted in order to make up the owners of a majority of the frontage. The statute was mandatory, and this is a statutory requirement which courts cannot disregard. Nor could the signatures of executors, administrators and agents be counted in the absence of evidence of their authority to sign the petition. Nor could the signature of a private corporation, made by its president and secretary, be counted, in the absence of evidence that such officers were authorized to affix the signature, or that that duty appertained to their offices. *Kahn v. Board of Supervisors* (1889), 79 Cal. 388; s. c., 21 Pac. Rep. 849; affirmed in 25 Pac. Rep. 403.

¹ *Spaulding v. North San Francisco &c. Ass'n*, 87 Cal. 40; s. c., 25 Pac. Rep. 248, the court distinguishing *Mulligan v. Smith*, 59 Cal. 206, and *Kahn v. Supervisors*, 79 Cal. 388; s. c., 21 Pac. Rep. 849, in that these cases arose upon a special statute which did not provide for an adjudication of the jurisdictional fact that a ma-

jority of the frontage of lots fronting on the work proposed to be done was represented by the owners thereof in a petition for the work, and did not provide for a hearing to any of the owners of such frontage on that issue. But the statute involved in *Spaulding v. North San Francisco &c. Ass'n*, *supra*, does not provide for such adjudication by and such hearing before the board of supervisors, and that the decision of the board that a majority of such frontage was represented in the petition was a decision which the act says “shall be final and conclusive.” The rule that “whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack,” stated in *Freeman on Judgments*, § 523, has been expressly applied by this court to boards of supervisors in *People v. Hagar*, 52 Cal. 182, which governed this case.

to the limitations on the assessment of private property, and compensation for damages sustained." The Supreme Court of Ohio has construed this provision to require that a strict construction be placed upon those proceedings by which it is sought to deprive the owner of his right to damages for property taken for, or injured by, the improvement; and in order to create a forfeiture or bar of his claim it must appear that the conditions upon which such forfeiture or bar depends have been strictly performed. They held that the requirements of the statute with respect to the notice to owners of abutting lands must be strictly complied with; and that it was essential that the notice given them of the passage of the resolution declaring the necessity of the improvement should be a written notice, served or authorized by the proper board, in order to bar property owners of their damages. Further, that in a proceeding to assess damages under the statute, if the municipal corporation makes the owner of property abutting upon the improvement, who had filed his claim for damages with the clerk of the corporation, a party to the application for the jury in the statute provided for, and submits the assessment of his damages to the determination of a jury, and a verdict is returned in his favor for the amount proven, the corporation cannot in that proceeding defeat his rights to the damages so assessed him on the ground that he waived the same, and was barred from receiving damages by reason of his failure to file his claim within the time prescribed by law.¹

§ 1048. Authority to assess for cost not exclusive.— The statute of Pennsylvania which provides for the appointment of viewers to assess the cost of street improvements in cities "on the property benefited according to benefits, if sufficient can be found, but if not," that "the deficiency, when finally ascertained, shall be paid by the municipal corporation," does not deprive the city of the general power to make such im-

¹City of Cincinnati v. Sherike, 47 Ohio St. 217; s. c., 25 N. E. Rep. 169. The court said: — "If the city . . . desired to controvert the right of the defendant in error to have any damages assessed him because he did not file his claim within the proper time, it should have done so by declining to file the claim out of time, or excluding it from the application for the jury, or dismissing it before submission to the jury."

provements at the expense of the city; and the council of a city may set apart, out of the general revenue, sufficient money to pay for the construction of a sewer.¹

§ 1049. Cost of new sidewalk required by change of grade. A Connecticut borough, having under its charter power to order owners of land abutting on public streets to construct sidewalks at their own expense, with a provision that when, in pursuance of such order, an owner builds a sidewalk, and it is deemed necessary by the borough to change the same within ten years thereafter, such change must be made at the borough's expense, cannot be held liable for the costs of laying a new sidewalk in place of a perfect existing sidewalk which had been built more than ten years before at the expense of the owner, where the laying of the new sidewalk had been necessitated by raising the grade of the street.²

§ 1050. Conclusiveness of determination of council.—The Supreme Court of Minnesota has construed the charter of one of the principal cities of that State and held that as respects the proceedings of the board of public works in making a local assessment under the charter the determination of the board in reference to the assessment district and what property shall be included or excluded therefrom, and in the apportionment of the amount of benefit to each lot or parcel, is final, except in case of fraud or mistake. And whether a public improvement can be deemed local in its character does not depend upon its extent or cost, though these elements are to be considered (and the assessment can in no event exceed the special benefits to the property so locally affected), but must

¹ *Commonwealth v. George* (Pa., 1892), 24 Atl. Rep. 59. The court said:—"There is nothing whatever in this . . . act from which it can be inferred that the method provided therein for assessing the cost of these improvements was intended to limit the power of councils to pay for the improvements in that way alone. The power therein given is additional to the power to do this work at the expense of the city."

² *Welton Co. v. Borough of Birmingham* (Conn., 1892), 24 Atl. Rep. 978. See, also, *New York &c. R. Co. v. City of Waterbury*, 60 Conn. 1; s. c., 22 Atl. Rep. 439; *Yale College v. City of New Haven*, 57 Conn. 1; s. c., 17 Atl. Rep. 139; *Durand v. Borough of Ansonia*, 57 Conn. 70; s. c., 17 Atl. Rep. 283; *Lewis v. City of New Britain*, 52 Conn. 568.

depend upon the determination of the city council and board of public works, to whose judgment the matter is committed by the legislature, to be determined largely as a question of fact. And if it be found that property in the vicinity of the improvement is so situated and related to it as to receive special benefits in the enhancement of its value beyond that of property generally, the improvement may for the purposes of a special assessment be deemed local, though the property in the city or ward is also generally benefited.¹ If, in the exercise of the large power committed to their discretion, the board of public works comply with the formal requirements of the charter, its action must necessarily be final, both as to what property is benefited and how much, except in case of fraud or palpable mistake, or unless it is made to appear that an improper rule has been followed in making an assessment.² If it is made clearly to appear that through fraud or mistake property has been improperly included in, or excluded from, an assessment district for a public or local improvement, the court may interfere to vacate or set aside an assessment.³ And every reasonable intendment of good faith and regularity is to be indulged by the court in respect to the acts of such officers while acting within their jurisdiction in the discharge of such duties.⁴

§ 1051. Including several streets in one improvement.—

The charter of a leading city in Minnesota has been frequently before the Supreme Court of that State for construction and a determination of the powers of city officials. Among other things, it has been held that under the provisions of that charter the work of grading, filling and bridging on a public street,

¹ *State v. District Court of Ramsey County* (1885), 33 Minn. 295. The validity and provisions of this charter are considered and upheld in *Carpen-ter v. City of St. Paul*, 23 Minn. 232, and *Rogers v. City of St. Paul*, 22 Minn. 494, 507, in which the court held that "the fact that the street to be improved is the most public thoroughfare in the city does not prevent the improvement from being local," but the local character of the

improvement depends upon the special benefit which will result to the real property adjoining or near the locality in which the improvement is made."

² *State v. Board of Public Works*, 27 Minn. 442; *State v. District Court of Ramsey County*, 33 Minn. 164.

³ *State v. District Court of Ramsey County* (1885), 33 Minn. 295.

⁴ *Matter of Episcopal School*, 75 N. Y. 324.

and also the grading of other streets in connection therewith, may be so connected together as to be properly carried on in common, and be prosecuted as one entire improvement, for which a local assessment may be made by the board of public works on property specially benefited thereby.¹

§ 1052. Notice of proposed improvements.—Where the power of a governing board of a municipality to make public improvements is derived from a statute which provides for notices of the application and proposal for such improvements before an ordinance is passed, and requires the clerk of such board to post for a specified number of days in a number of public places a notice “stating that objections in writing to the proposed improvement may be filed with him, and of the time and place when and where the township committee will meet to consider such objections,” a failure to give such notices, or the giving of insufficient notices, will invalidate any ordinance passed for an improvement, unless the insufficiency has been effectively waived or cured.²

¹ *State v. District Court of Ramsey County* (1885), 33 Minn. 295. See, also, *Wilbur v. City of Springfield*, 123 Ill. 395; *Mayall v. City of St. Paul*, 30 Minn. 294; *Matter of White*, 75 N. Y. 354; *State v. District Court of Ramsey County*, 29 Minn. 62, where gutters and culverts were included with grading. The improvement included an embankment, which at its base necessarily extended beyond the limits of the street. It was held competent for the legislature to provide, as it had done in a special statute, in aid of the proceedings under the charter, for the acquisition of the proper easement or license to use and occupy the adjoining lands for such purposes, saving to the landowner the right to use the land abutting on the street as graded. *State v. District Court of Ramsey County* (1885), 33 Minn. 295.

² Though persons objecting to an improvement ordered by an ordinance may have filed written objec-

tions, and did not object to the insufficiency of the notice, if it does not appear that they attended at the place of meeting, there is no waiver of the defect in the notice and it may be considered by the clerk on *certiorari*. *State v. Town of West Hoboken*, 53 N. J. Law, 64; s. c., 20 Atl. Rep. 737. See, also, *Beam v. Patterson*, 47 N. J. Law, 15. But if objectors permit proceedings for an improvement to continue unchallenged until an assessment has been imposed upon them, their case would come within the terms of the New Jersey statute which provides that “no assessment shall be set aside or affected by reason of the mistake of the township clerk in the form, substance or manner of publishing or posting said advertisement.” *State v. Town of West Hoboken*, *supra*. The court did not determine the question whether a legislature could validate a deficient notice in the absence of proof of actual notice, but left it open.

§ 1053. Ordinances for improvements.— Though a statute provides that before improving any street an ordinance shall be adopted by a two-thirds vote of the council of a city requiring the improvement to be made, and assessing two-thirds of the cost to the abutting lots, the ordinance itself need not specify the material to be used, the choice of which may be made without a two-thirds vote, by resolution or otherwise, as the ordinance may provide.¹ It is not necessary that an ordinance directing the paving of a certain street, except a sixteen-foot strip in the middle thereof, should specify the width of the paving, where the recorded plat shows the width of the street, and the city ordinances show the width of the sidewalks, because the statute provides that an ordinance determining on a local improvement, to be paid for by special assessment, shall specify the “nature, character, location and description of such improvement.”² Nor need such an ordinance specify the exact amount of paving composition which should be used to the square yard.³ An ordinance providing for the construction of a sewer having forty-eight man-holes, to be located “one at each crossing and abutting street, and the remainder at such intermediate points as the engineer in charge may select,” has been held sufficiently specific as to the location of the man-holes.⁴ The failure of an ordinance to set out the specifications for work to be done under it, where reference to them is on file in the office of the clerk of the council, will not affect its validity.⁵ The “oath” and “detailed statement” mentioned in the statute of Kansas requiring that, “before” any kind of work or improvement shall be commenced by a municipality, “a detailed estimate of the cost thereof shall be made under oath by the city engineer and submitted to the council,” are conditions precedent.⁶

§ 1054. What must be specified in an ordinance.— An ordinance of a city for a local public improvement to be made

¹ *Bacon v. City of Savannah*, 86 Ga. 301; s. c., 12 S. E. Rep. 580.

² *Woods v. City of Chicago*, 135 Ill. 582; s. c., 26 N. E. Rep. 608, following *Adams County v. City of Quincy*, 130 Ill. 566; s. c., 22 N. E. Rep. 624.

³ *Woods v. City of Chicago*, *supra*.

⁴ *Cochran v. Village of Park Ridge* (Ill.), 27 N. E. Rep. 939, following *City of Springfield v. Mathers*, 124 Ill. 88; s. c., 16 N. E. Rep. 92.

⁵ *Becker v. City of Washington*, 94 Mo. 375; s. c., 7 S. W. Rep. 291.

⁶ *Gilmore v. Hentig*, 33 Kan. 156.

wholly or in part by special assessments must specify "therein the nature, character, locality and description of such improvement," under the statute of Illinois referring to such matters. It is not sufficient, as this statute is mandatory, to refer in the ordinance to specifications on file in the city clerk's office, as showing the nature and character of the proposed improvement, as that is not made a source of information.¹ It has been urged that an ordinance of a city council providing for a public improvement, and declaring that a portion of it should be paid by a special tax upon contiguous lots, and the rest by general taxation, and empowering commissioners to determine the cost and to assess the proportions, was invalid as delegating the authority of the council prohibited by law. Such an ordinance was sustained, however, when the *data* by which the several amounts could be fixed were sufficiently given.²

¹ *City of Sterling v. Galt* (1886), 117 Ill. 11; s. c., 7 N. E. Rep. 471; *Foss v. City of Chicago*, 56 Ill. 354; *Lake Shore &c. R. Co. v. City of Chicago*, 56 Ill. 454; *Lake v. City of Decatur*, 91 Ill. 600; *Jacksonville Ry. Co. v. City of Jacksonville*, 114 Ill. 562.

² *Kimble v. City of Peoria* (Ill., 1892), 29 N. E. Rep. 723. In *Gilmore v. City of Utica* (N. Y. App., 1892), 29 N. E. Rep. 841, it was held that an assessment for a street improvement would not be vacated because the resolution deciding to make the improvement according to plans to be prepared by the city surveyor, and calling for proposals, was adopted before the plans and specifications for the work were filed, where the plans were filed and approved before adopting the final ordinance providing for the improvement, on the ground that the New York statute did not require a separate approval of the plans and specifications before publishing for bids. In *Kimble v. City of Peoria*, *supra*, it was held that an ordinance for paving a street which provided that "the brick to be used in

said pavement shall be of the best quality;" that the road-bed be excavated ten inches, the space filled with five inches of gravel, and the remaining five inches with paving brick, placed upon the gravel after it had been well packed, sufficiently described the nature and character of the paving. The court said: — "That selection [the kind of brick to be used] [by the city engineer and street committee, under whose direction the ordinance provided the paving should be done], of course, would be made or determined before a bid for the work would be secured, and then all uncertainty would be removed so that an intelligent bid could be made for the work." Following *City of Sterling v. Galt* (1886), 117 Ill. 11; s. c., 7 N. E. Rep. 471, holding that when, acting under such an ordinance, the commissioners have so fixed or ascertained the amount to be thus raised in conformity with the ordinance, it is conclusive on the property owners. See, also, *Enos v. City of Springfield*, 113 Ill. 65; *City of Galesburg v.*

§ 1055. Formality and irregularity in proceedings.—The provision in a statute that any class of proposed public improvement could be authorized only by “a majority of the voters of the city” does not require that the proposition shall be approved by a majority of all the voters of the city, but only by a majority of the votes cast.¹

§ 1056. Changing plan of improvement.—A city council having declared the paving of a street to be a necessary public improvement may afterward change the plan for the improvement; and such a change being made will not invalidate a tax levy made for the purpose of paying the expense of such improvement.¹ That an ordinance of a city does not provide for advertising for bids for work under it will not invalidate it when it appears that advertisement was made as required by the charter as provided for in another ordinance.²

Searles, 114 Ill. 217; *White v. People*, 94 Ill. 604; *Craw v. Village of Tolono*, 96 Ill. 256.

¹ *Taylor v. McFadden* (Iowa, 1892), 50 N. W. Rep. 1070. See, also, *Dillon on Munic. Corp.*, § 44; 2 *Desty on Taxation*, 1152; *Mitchell v. Warfield*, 20 Ill. 160; *Wheaton v. Wiant*, 48 Ill. 263; *St. Joseph Tp. v. Rogers*, 16 Wall. 644; *Sanford v. Prentice*, 28 Wis. 358; *Yessler v. City of Seattle* (Wash.), 25 Pac. Rep. 1014. In determining the question of whether a majority of abutting land-owners have signed a petition for a change of grade of a street, it appearing that a leaf torn from a petition which preceded an ordinance for the same improvement which was afterwards set aside was attached to the one which preceded the ordinance finally passed for it, the names of those signers on the detached cannot be counted as signers of the last petition unless it be shown that the signers thereof assented to its second use. *State v. Mayor &c. of City of Bayonne* (N. J. Law, 1892), 23 Atl. Rep. 648, hold-

ing, also, that the name of one signed, “per ———, Att’y,” could not be counted where it appeared that the agent signing had not seen the principal, and there was no written authority for the signature filed with the petition. See as to estoppel of land-owner to set up irregularities, *Prezinger v. Harness* (1887), 141 Ind. 491; *Clements v. Lee* (1887), 114 Ind. 397; *Martindale v. Palmer*, 52 Ind. 411; *Taber v. Ferguson*, 109 Ind. 227; *McGill v. Bruner*, 65 Ind. 421.

¹ *Davies v. City of Saginaw* (Mich., 1891), 49 N. W. Rep. 667.

² *Bambrick v. Campbell* (1889), 37 Mo. App. 460. In *State v. City of Bayonne* (N. J., 1890), 20 Atl. Rep. 69, it was held that a notice under the New Jersey statute, which requires that notices to be given of assessments, in connection with public improvements, “shall clearly state the character of the work and improvement for which such assessments have been made, and a description of the streets or avenues, or particular sections thereof, which are in-

§ 1057. **Railroad bridge across a street not a local improvement.**—The Illinois statute which empowers cities and villages to make local improvements by special taxation does not authorize them to provide in that way for the erection of a railroad bridge across a city street.¹ The action of a city council in providing for such an alleged local improvement to be paid for by special taxation is reviewable by the courts.² The provision in a charter forbidding the city to adopt, lay out, open, work or grade any street less than sixty feet wide has been held to refer to “streets and highways,” strictly so called, and not to “bridges.”³ Within the limits that the improvements required by a town must be useful and reasonable in character, the governing authorities of the town may regulate the material to be used and the manner in which the work shall be done.⁴ A municipal corporation may authorize the building of a public bridge, with a proviso that if a private person contribute enough to build a more convenient one, that one shall be built.⁵ An ordinance passed by a common council to open a street will not be set aside on the ground that a citizen has promised to pay a part of the expense of its opening, such a promise not being opposed to public policy.⁶ The fee of a street remaining in a city, it is not prevented, by special tax, from making necessary improvements in a street by the fact that it has granted a railroad company the privilege of using the street for its tracks.⁷

§ 1058. **Rule as to repaving, etc., in Pennsylvania.**—The repairing of the pavement of a street by a city council, though extensive in its nature, and of a reasonably permanent nature, made at the expense of a city and not of the

cluded in said assessment,” describing lands by giving distances along specified streets and avenues, and substantially showing that such lands are assessed for benefits, satisfies the requirements of the statute.

¹ *City of Bloomington v. Chicago &c. R. Co.*, 134 Ill. 451; s. c., 26 N. E. Rep. 366.

² *City of Bloomington v. Chicago &c. R. Co.*, *supra*.

³ *Langlois v. City of Cohoes*, 11 N. Y. Supl. 908.

⁴ *Hood v. Trustees of Lebanon (Ky.)*, 15 S. W. Rep. 516.

⁵ *Kelley v. Kennard*, 60 N. H. 1.

⁶ *State v. City of Orange (N. J.)*, 22 Atl. Rep. 1004.

⁷ *Chicago &c. R. Co. v. City of Quincy (Ill.)*, 28 N. E. Rep. 1069.

abutting owners, is not an original paving, such as will prevent a future paving at the expense of the abutting owners.¹

§ 1059. Opening and widening streets.—The authority of a municipal corporation invested with full power to lay out and open streets is exclusive, and no other tribunal can assume jurisdiction within the corporate limits.¹ In proceeding to open a street where the evidence shows that the parcel of land left after opening the street would be a narrow strip which would be worthless, a jury could give as compensation the actual value of the entire lot, together with any damages arising from such use.² In proceedings to open a street, in order to find that the street is a public necessity it is not necessary to find that the cost of opening added to the cost of grading would not exceed the value of the benefit to the public.³ The appearance of property owners before commissioners in proceedings for widening a street in response to notice will operate as a waiver of technical objections to the sufficiency of the petition.⁴

§ 1060. Reconstruction of streets and sidewalks — Second assessment.—The Supreme Court of Kentucky has adopted the doctrine that power exists in the legislature to authorize reconstruction of a street by assessment of property bordering on the street, just as was done for the original improvement;

¹City of Philadelphia v. Dibeler (Pa. St., 1892), 23 Atl. Rep. 567. It was urged that these owners of abutting lots were not liable to be assessed for benefits, upon the principle established in Hammett v. Philadelphia, 65 Pa. St. 146, that "when a street is once opened and paved, thus assimilated with the rest of the city and made part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed," and the cost of repaving the street cannot be provided for by local assessments, but must be defrayed by general taxation.

¹Cherry v. Keyport (1890), 52 N. J.

Law, 544; s. c., *sub nom.* Cherry v. Board of Comm'rs, 20 Atl. Rep. 970.

²City of Grand Rapids v. Widdicomb (Mich., 1892), 52 N. W. Rep. 635.

³City of Grand Rapids v. Widdicomb (Mich., 1892), 52 N. W. Rep. 635.

⁴*In re* Widening of Washington Street, 14 N. Y. Supl. 470. In Packard v. Bergen Neck Ry. Co. (N. J.), 22 Atl. Rep. 227, it was held that the charter of a city, requiring that provisions for opening and grading a street must be taken by "ordinance," applied to the building of a drawbridge, and the provisions therefor by "resolution" were void.

and that though the amount to be expended is insufficient to improve every street, the right to improve the principal thoroughfares, or such as will prove most beneficial to a city, may nevertheless be exercised by a city council.¹ So, when a turnpike company, under authority of the legislature, contracts with a city for a surrender of so much of its road as is within a city's limits, the city may reconstruct the road as a street when the surrender is made.² •

§ 1061. Paving streets.—It has been held that a provision in a statute that “it may be prescribed by ordinance that paving of streets . . . shall be done at the expense of” the abutting owners, “and liens may be filed by [the] city for the same, as it is now practiced and allowed by law,” did not restrict the discretion of the city council as to the kind of pavement to be laid, and that the fact that the sides of a street had been for many years paved with cobble-stones would not preclude them from directing the paving of the center with granite.³ Paving a street and laying edge-stones for the sidewalk is a “local” improvement for which a special tax may be assessed on abutters under the Illinois statute.⁴ An additional width to a sidewalk is a “repavement” within the meaning of that term as used in the laws relating to sidewalks in New York city.⁵

¹ *Cassidy v. City of Covington* (Ky., 1891), 16 S. W. Rep. 93, following *Maddux v. City of Newport* (Ky.), 14 S. W. Rep. 957.

² *Cassidy v. City of Covington* (Ky., 1891), 16 S. W. Rep. 93. The power of a village council, organized under the general statute of Minnesota, as expressly conferred, as respects laying out, extending, discontinuing, grading and paving streets, is not limited by other provisions empowering it to take such action under certain circumstances, on petition of adjoining land-owners, and assessing them therefor. Under the general power a council may cause a sidewalk to be constructed, purchase the

material for the same, of their own motion, without such a petition, and pay for the same out of general funds. *Bradley v. Village of West Duluth* (Minn., 1890), 47 N. W. Rep. 166.

³ *City of Philadelphia v. Evans* (Pa.), 21 Atl. Rep. 200, holding also that the municipal authorities have a discretion as to the time at which the paving of streets is to be done, and it will not be interfered with merely because the work is done in a cold season of the year, and thus increases the cost over what it would have been if done at a different season.

⁴ *Enos v. Springfield*, 113 Ill. 65.

⁵ *In re Smith*, 99 N. Y. 424.

§ 1062. **Paving and repairing distinguished.**—The distinction between paving and repairing has been recognized in many cases, as, for instance, by the New York courts, where a street having a cobble-stone pavement was repaved with Belgian pavement, it was held that the work was not a repair of a street and the expense chargeable to the city, but a local improvement, and therefore the subject of a local assessment.¹ In a case where a railway company had the obligation upon it that “the space between the rails of [its] track and the street for a space of two feet on either side and along the line of said track shall be kept and maintained in good repair by [the] railway company,” the street then being unpaved, the city authorities afterwards determined to pave the street with sandstone blocks to be laid upon a foundation of concrete nine inches thick, and called upon the railway company to pave in that way between the tracks. The Missouri Supreme Court held the railway company not liable, on the ground that an obligation to repair a street is not an obligation to construct thereon a new pavement.²

¹ *In re Fulton Street*, 29 How. Pr. 429.

² *State v. Railway Co.*, 85 Mo. 263. The Maryland Court of Appeals has taken the same view in a case where the obligation of a street railway company was to keep its track and the space of two feet on each side of it “in thorough repair,” and the improvement was to repave with Belgian pavement in place of cobblestone. *Mayor v. Scharf*, 54 Md. 499, 525. With a similar obligation upon a street railway company the Indiana Supreme Court has held that the company could not be compelled to pay the expense of regrading with asphalt. *Western Paving & Supply Co. v. Citizens' Street R. Co.* (1891), 128 Ind. 525; s. c., 26 N. E. Rep. 188; 28 N. E. Rep. 88, in which case it was also held that a street railway company, the property of which is not subject to assessment for street improvements, is not es-

topped to deny its liability for an assessment because it stands by without objection until the improvement is completed, if it is one which the city has authority to make. The Massachusetts Supreme Court have said, on the other hand, that no sound distinction can be made between needful repairs and such improvements as are required by the public good. *Railroad Co. v. Wakefield*, 103 Mass. 261, 266. The Supreme Court of Michigan assumed in a case that a liability to keep “in good order and repair” included paving. *People v. Railway Co.*, 41 Mich. 413; s. c., 2 N. W. Rep. 188. And so the Pennsylvania Supreme Court where the obligation was to keep “in perpetual good repair.” *Railway Co. v. Philadelphia City*, 124 Pa. St. 219; s. c., 16 Atl. Rep. 741. The New York Court of Appeals on the same principle has held that a commissioner of highways, under the power given him to repair high-

§ 1063. **Repairs of streets, etc.**—The duty of a city is *quasi*-judicial or discretionary when a power is conferred upon it to make public improvements, such as streets, sewers, culverts and drains; and for a failure to exercise this power or an erroneous estimate of the public needs no civil action can be maintained. But after this *quasi*-judicial or discretionary power has once been exercised and the improvement made, the duty of keeping it in repair, so as to prevent it from being dangerous to the public, is maintained, and for a negligent omission to do so an action by the party injured will lie.¹ A town may lawfully make a contract with private persons whereby the latter are bound to raise the grade of a road to a certain level and to keep it in repair forever.²

§ 1064. **Lawful improvements.**—Averments that the street commissioner of a city is about to excavate and change the grade of a street “without authority of law,” and that the mayor is “unlawfully” procuring and suffering the excavation to be done, will not establish the unlawfulness of a change of grade, in a suit to enjoin the mayor and street commissioner from changing the grade of a street, where a city is authorized by statute to change the grade of its streets.³ Nor will allegations that a city had sold its negotiable bonds and was about to use the proceeds in purchasing a site for and in erecting a city hall sustain an action to enjoin the expenditure of the proceeds of the bonds for that purpose, where

ways, may build a new bridge when necessary to connect the two portions of a highway interrupted by an intersecting stream, the theory of the ruling being that it was necessary in order to make the highway passable. *Huggans v. Riley*, 125 N. Y. 88; s. c., 25 N. E. Rep. 993.

¹ *Wessman v. City of Brooklyn* (1891), 16 N. Y. Supl. 97; *Mayor &c. v. Furze*, 3 Hill, 612, followed in *Wilson v. Mayor &c.*, 1 Denio, 601; *Hutson v. City of New York*, 9 N. Y. 168; *Griffin v. City of New York*, 9 N. Y. 461; *Mills v. City of Brooklyn*, 32 N. Y. 498; *Barton v. Syracuse*, 36 N. Y. 54; *McCarthy v. Syracuse*, 46 N. Y.

196; *Urquhart v. Ogdensburg*, 91 N. Y. 71.

² *Inhabitants of Brookfield v. Reed*, 152 Mass. 568; s. c., 20 N. E. Rep. 138; *Inhabitants v. Cutter*, 114 Mass. 344; *Harris v. Springfield*, 107 Mass. 532, 540; *Bell v. Boston*, 101 Mass. 506; *Crocket v. Boston*, 5 Cush. 182; *Seymour v. Carter*, 2 Met. 520; *Hawks v. Charlemont*, 107 Mass. 414; *Deane v. Randolph*, 132 Mass. 475; *Waldron v. Haverhill*, 143 Mass. 582; s. c., 10 N. E. Rep. 481; *Sullivan v. Holyoke*, 135 Mass. 273.

³ *Kemper v. Campbell* (Kan.), 26 Pac. Rep. 53.

the city has authority under the general statutes of the State to purchase and hold real estate and to provide public buildings for the accommodation of its officers.¹ In case there is uncertainty as to the boundary line of a city, local improvements may be made with reference to any recognized city limits.²

§ 1065. Curative legislation.—Where a public work has been done under void authority—as, for instance, street improvements have been made under a statute which has been declared unconstitutional—and the property owners have received the benefits of the street improvements, the legislature has a right to legalize what it might previously have ordered, and therefore can remedy the matter by a curative act ordering the completion of such improvements.³

§ 1066. Supervisor of a county ordering improvements in a town.—*Certiorari* lies to review the action of a board of supervisors of a county in proceeding to improve streets and highways in a town, and directing an issue of bonds for the purpose of defraying the expense thereof, at common law, and no statutory enactment in the State of New York has taken away the office of the writ in that respect.⁴ But the action of such a board in directing the improvement of highways and issue of bonds is not subject to review by the Supreme Court on the ground of the extravagance of the undertaking and appropriation.⁵ The right of a board of supervisors of a county to direct an improvement of streets and highways in a town within the county is not affected by the fact that the highways to be improved form part of the

¹ *City of Argentine v. State* (Kan.), 26 Pac. Rep. 751.

² *Bloomington Cemetery Ass'n v. People* (Ill.), 28 N. E. Rep. 1076.

³ *Donnelly v. City of Pittsburgh* (Pa., 1892), 23 Atl. Rep. 394. See, also, *Satterlee v. Matthewson*, 16 Serg. & R. 169; *Schenley v. City of Allegheny*, 36 Pa. St. 29; *Commonwealth v. Marshall*, 69 Pa. St. 328; *Hewitt's Appeal*, 88 Pa. St. 60; *City of Harris-*

burg v. McCormick, 129 Pa. St. 214; s. c., 18 Atl. Rep. 126; *Chester City v. Black*, 132 Pa. St. 569; s. c., 19 Atl. Rep. 276.

⁴ *People v. Board of Supervisors of Queens County* (1891), 16 N. Y. Supl. 705.

⁵ *People v. Board of Supervisors of Queens County* (1891), 16 N. Y. Supl. 705.

streets of an incorporated village within the limits of the town.¹

§ 1067. Sidewalks.—When or where they will lay sidewalks in the streets of a village in Michigan is a matter of discretion of the trustees of the village, and a court of chancery has no jurisdiction to control that discretion, the legislature having confided that matter to the trustees.² Where such discretion of municipal officers or boards in repairing streets or sidewalks has been exercised within the scope of the powers conferred upon them by law, in the absence of fraud courts ought not to interfere with their action.³ A city has a right to build its sidewalks in its own way, after it has given a lot-owner ample opportunity to put in the sidewalk abutting upon his property.⁴

§ 1068. Contracts in restraint of right to control or improve streets.—A contract with a gas company, based on a valid consideration, allowing the company to lay pipes in the

People v. Board of Supervisors of Queens County (1891), 16 N. Y. Supl. 705. See, also, *People v. Board &c.*, 1 N. Y. Supl. 382.

² *Irving v. Ford* (1887), 65 Mich. 241; s. c., 32 N. W. Rep. 601.

³ *City of Emporia v. Gilchrist* (1887), 37 Kan. 532; s. c., 15 Pac. Rep. 532, in which case, a sidewalk having been condemned as unsafe by the authorities of the city, and the owner of the property abutting upon the sidewalk having failed to remove and rebuild it in the time given him under an ordinance of the city, after due notice that upon his failure to remove and rebuild it the city would do so at his expense, the city was held authorized to remove and rebuild it in its own way, and that an injunction should not be allowed against the city, when it began to remove the old sidewalk, for the simple reason that the material for the new sidewalk was not then on the ground ready for use.

⁴ *City of Emporia v. Gilchrist* (1887), 37 Kan. 532; s. c., 15 Pac. Rep. 532. If the public authorities of a municipality construct a sidewalk along one of its streets upon the private property of a lot-owner, the public have a right to its use, and the authorities are entitled to exercise the powers of control and supervision appropriate to public ways and walks. But if they attempt to exercise a proprietary right over the sidewalk,—as, for instance, to order it taken up and removed to another part of the municipality,—they invade the private rights of the owner of the land on which it is laid, and would be liable in an action of trespass. *Rogers v. Randall* (1874), 29 Mich. 41. The measure of damages in such a case, where the act was done not with bad motives, but under a belief that it was right and lawful, it was held, would be the value of the walk as it was when removed.

streets of a city, does not divest the municipality of power to lower the grade of its streets, and if necessary, to remove as nuisances the pipes thereby exposed to view, for the reason that a municipal corporation cannot alienate the express and plenary powers to grade and improve its streets granted to it by the legislature.¹ And of the necessity and expediency of removing as nuisances gas pipes from a street there exposed to view by the change of grade, the municipal council and not the court is the judge.² A city is not deprived of the power to make necessary improvements in one of its streets on which are the tracks of a railroad company by the fact that the railroad company agreed to so improve it, that vehicles might cross it in safety.³ And an ordinance for the improvement of a street is not void because of the possible injury to vested rights by its enforcement.⁴

§ 1069. Discretion of municipal authorities.—The decision of a city council empowered by statute “to lay out, alter, grade or otherwise improve streets,” and “to construct and keep in repair bridges, viaducts and tunnels,” that a viaduct extending over railroad tracks and a creek is a local improvement, to be paid for by special assessment, is, in the absence of fraud, final, if it appears that such a viaduct could not be properly constructed over the tracks without making it also cross the creek.⁵ In the absence of fraud, the time for completing a street improvement under a contract may be extended by the common council of a city.⁶ The municipal authorities are empowered to determine what is a reasonable time under a statute requiring abutters to improve streets when notified “within a reasonable time.”⁷

¹ *Roanoke Gas Co. v. City of Roanoke*, 88 Va. 810; s. c., 14 S. E. Rep. 665.

² *Roanoke Gas Co. v. City of Roanoke*, *supra*.

³ *Chicago &c. R. Co. v. City of Quincy (Ill.)*, 28 N. E. Rep. 1069.

⁴ *Chicago &c. R. Co. v. City of Quincy (Ill.)*, 28 N. E. Rep. 1069.

⁵ *Louisville &c. R. Co. v. City of East St. Louis*, 134 Ill. 656; s. c., 25 N. E. Rep. 962.

⁶ *Terre Haute &c. R. Co. v. Nelson (Ind.)*, 27 N. E. Rep. 486, following *Jenkins v. Stetler*, 118 Ind. 275; s. c., 20 N. E. Rep. 788. The city council must fix the grade of the curb of a street. The fixing of such grade may not be delegated to the city engineer. *Lippelman v. Cincinnati*, 4 Ohio Cir. Ct. 327.

⁷ *Fass v. Seehawer*, 60 Wis. 525. It is not essential for the continued existence of a street laid out by a city

§ 1070. **The same subject continued.**—The charter of a city provided that the common council should have supervision of all streets, etc., and should cause them to be improved and repaired, and give directions therefor when necessary; also that the board of public works should have power to repair, pave, etc., all streets as the council might declare to be a necessary public improvement; and that when the council decided that any public work was a necessary improvement the board should determine the particular kind and quantity of materials to be used therefor. Under such provisions the council could order the pavement of streets with gravel and cobble-stones, and the board of public works could not refuse to do the work because it deemed such materials unsuitable, its power to determine “the particular kind and quantity of materials” being restricted to matters of detail, within the general limits prescribed by the council.¹

§ 1071. **Streets with railways intersecting them.**—Under a New Jersey statute municipal authorities may, in furtherance of the purposes of the statute, which were to provide for the better protection of citizens on account of the danger incident to railway companies running their cars into the municipalities, vacate any street or any part of a street, and change the grade upon any street or part of a street, without the consent of abutting owners. They may also construct bridges as parts of streets, to carry the public way above intersecting railroads. If an ordinance, which is intended to change the grade of a street so as to carry the way over an intersecting railroad by means of a bridge and approaches, contains a clause vacating a part of the street on which the approach is to rest, it thereby defeats its main object and should be set aside as unreasonable.²

that the city shall immediately grade and improve it. It is discretionary when further improvement shall be necessary, and a failure to improve cannot be construed as an abandonment of the street so as to justify private ownership thereof. *Louisiana Ice Mfg. Co. v. City of New Orleans* (La.), 9 So. Rep. 21.

¹ *Common Council v. Board of Public Works* (Mich., 1891), 49 N. W. Rep. 481, in which a writ of *mandamus* to compel the board to proceed with the work was ordered to issue.

² *Read v. City of Camden* (N. J., 1892), 24 Atl. Rep. 549, reversing 21 Atl. Rep. 565. The court said, in re-

§ 1072. **Local assessments.**—It is well settled that the power to make a public improvement on the part of a municipal corporation and to impose the burden of the same upon the owners of property benefited thereby is one which the legislature may confer upon such corporations as a part of the taxing power belonging to the State. This power of taxation and of apportioning taxation, or of assigning to each individual his share of the burthen, is vested exclusively in the legislature, unless the power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be levied without apportionment; and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation. There is not generally in our States any restraint upon it. It is competent for the legislature to apportion the tax generally upon all taxable persons within its jurisdiction, or within a certain district or local division; or it may apportion the tax according to the benefit which each tax-payer is supposed to receive from the object on which the tax is expended. Whether or not one mode or the other is the more equitable, the legislature is the sole and exclusive judge. It is wholly a matter of legislative discretion which method shall be adopted, and it is not at all a matter for judicial inquisition or review.¹ Special assessments

ply to the contention that the bridge to be built could not be deemed a part of the street, and also because the bridge and its approaches were to occupy only one-half of the width of the street, that the work was not a "change of grade" upon the street:—"A street is only an improved public way through a town or city, and whether the way rests immediately upon the solid ground, or is supported above it like a bridge, it may still be called a 'street.' No doubt the legislature may use the terms 'street,' 'road' and 'highway' in a sense which excludes bridges in their route; but since in [the statute before the court] the power to change the grades of streets and highways was

evidently conferred in order that travel thereon might pass over or under intersecting railroads, the legislature may have intended to include bridges as a part of the streets and highways at their new grades. Nor is there anything illegal in the establishment of different grades for different longitudinal sections of a street. Sidewalks and carriage ways are common instances of such different grades, when, as here, there may be sufficient reason for great divergence; that is not illegal. It was within the discretion of the council to determine whether the embankment and bridge should occupy the whole width of the street or not."

¹ People v. Mayor &c. of Brooklyn,

proceed upon the principle that certain property, peculiarly situated in reference to an improvement, is to be specially benefited in the enhancement of its value, and in levying such assessments the principle of equality in their apportionment is deemed vital, as in ordinary cases of taxation under the constitution.¹

§ 1073. Special taxation in Illinois.— In Illinois there is a distinction between special taxation and special assessment. The power of special taxation of contiguous property for the making of local improvements by a city does not depend upon the fact of an equivalent benefit to the property taxed. The power is given unqualifiedly by the Illinois statute, with no restriction as to the benefiting of contiguous property.² On the subject of special taxation the Illinois Supreme Court said in another case: — “This proceeding is in the taxation of contiguous property; and in the adoption of that mode there is no requirement of benefits received, and no respect thereto further than may be had by the city council in determining upon which particular one of the several modes of special taxation of contiguous property open to them shall be resorted to.”³ A committee to estimate the cost of a local improvement may be appointed after the passage of an ordinance for

4 Comst. 426, 427, 432. See, also, *McComb v. Bell*, 2 Minn. 295; *Stinson v. Smith*, 8 Minn. 366.

¹ *Noonan v. City of Stillwater* (1885), 33 Minn. 198, where, upon the principles of the text, it was held that it was in accordance with the constitution of the State, which provided that “the legislature may by general law or special act authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to a cash valuation and in such manner as the legislature may prescribe, “for the charter of the city to make it the duty of all owners of land adjoining any street,

lane or alley in the city, to construct, reconstruct and maintain in good repair such sidewalk, along the side of the street, lane or alley next to the lands of such owner, respectively, as may have been heretofore constructed or shall hereafter be constructed or directed by the city council to be built;” but the further provision attempting to make the owners of such lots liable for all damages resulting from any default of theirs in keeping such sidewalk in repair was repugnant to the constitution.

² *City of Galesburg v. Searles* (1885), 114 Ill. 217; s. c., 29 N. E. Rep. 686.

³ *White v. People*, 94 Ill. 604. See, also, *Enos v. City of Springfield*, 113 Ill. 65.

constructing it and before its approval by the mayor of the city without vitiating the proceeding. It is sufficient if the ordinance is signed before the petition is filed in the county court to have the tax levied for half the estimated cost upon contiguous property.¹

§ 1074. Constitutionality of assessments for sidewalks.—It has been urged that laws imposing upon the owners of lands abutting upon streets the expense of constructing sidewalks were unconstitutional in that the power to do this was referable to the power of taxation, and that statutes conferring such power upon cities to require owners of such lands to build and maintain suitable pavements or sidewalk improvements along their premises when necessary to the safety or convenience of travel, and to enforce obedience by fines, and ordinances to that effect, were attempts to levy a tax in a manner not authorized by the State constitution. Judge Cooley on this subject says:—"The cases of assessment for the construction of walks by the sides of streets in cities and other populous places are more distinctly referable to the power of the police. The footwalks are not only required as a rule to be put up and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority on the municipalities to order the walks of a kind and quality by them prescribed, to be constructed by the owners of the adjacent lots at their own expense, within a time limited by the order for the purpose, and that in case of their failure so to construct them, it shall be done by the public authorities and the cost collected from such owners or made a lien upon their property. When this is done the duty must be looked upon as being enjoined as a police regulation made because of the peculiar interests such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing with promptness and convenience the duty of putting them in proper state, and of afterwards keeping them in a state suitable for use. Upon these grounds the authority to establish such regulations has frequently been supported."²

¹ *City of Galesburg v. Searles* (1885), *Cf. Burroughs on Taxation*, 494, and 114 Ill. 217; s. c., 29 N. E. Rep. 686. ² *Desty on Taxation*, sec. 190.

² Cooley on Taxation (2d ed.), 588.

supervision of the county court, such court has power to reduce a road of the statutory width of sixty feet to the width of forty feet.¹ Under the Nebraska statutes a county board has no jurisdiction to establish a public road where no commissioner has been appointed to examine into and report upon its expediency, unless the written consent of all the land-owners whose land is sought to be taken for that purpose is filed with the county clerk.² The right of appeal from the decision of the commissioners of highways in regard to vacating a road under the Illinois statute allowing such an appeal is limited to owners of land adjoining that part of the road to be vacated.³

§ 1077. Opening highways.—It has been held that the legislative intention in the statutes of Pennsylvania providing that the court, on being petitioned to grant a view “for a road,” shall appoint qualified persons to view the grounds proposed for “such road” and make report of their proceedings, and that if the persons appointed shall agree that there is occasion for “a road” they shall proceed to lay out the same, having respect to the shortest distance and the best

ment of any county road unless the petition therefor is signed by a majority of the resident land-owners within one-half mile on either side of such regularly laid out road, within the terminal points mentioned in the petition, in accordance with the requirements of the statute. *Barker v. Hovey* (Kan.), 26 Pac. Rep. 591. Where a petition is for the extension of a village street, a request contained therein that the street be declared a public highway, being harmless, as the street is presumably a public highway, it is not necessary that all the tracts abutting thereon be specified in the notice of meeting, or that their several occupants be served, as in proceedings to declare a public highway. *State v. O'Connor* (Wis.), 47 N. W. Rep. 433. The board of county commissioners in Indiana has authority to act in all

matters pertaining to the establishment and construction of county roads at a special session convened upon oral notice from the county auditor. *Loesnitz v. Seelinger*, 127 Ind. 422; s. c., 25 N. E. Rep. 1037, following *White v. Fleming*, 114 Ind. 560; s. c., 16 N. E. Rep. 487.

¹ *Heiple v. Clackamer County*, 20 Oregon, 147; s. c., 25 Pac. Rep. 291.

² *Warren v. Brown* (Neb.), 47 N. W. Rep. 633. The proceedings had under a statute to create a highway should be so definite and certain that a competent surveyor could, with a record before him, point out its location. *Warren v. Brown*, *supra*.

³ *Comm'rs of Highways v. Quinn* (Ill.), 27 N. E. Rep. 187, following *Taylor v. Comm'rs*, 88 Ill. 526, and overruling *Whitmer v. Comm'rs*, 96 Ill. 292.

ground for "a road," was that there should be a separate petition for each road, and a single proceeding throughout, including the recording of the road.¹ The supervisors of a township cannot refuse to obey an order of the court to open a highway made upon a confirmed report of viewers, under the Pennsylvania statutes, on the ground that they did not think it necessary.² The duty of tracing the line of a proposed public road under the statutes of Louisiana is intrusted to a jury of freeholders, and police juries, the county authorities, have no right on a petition to establish a public road to trace the line of it. But they have certain authority as to its width and direction, and unless it can be shown that they have absolutely dictated the line to be followed, it will not be held that they have exceeded their authority.³

§ 1078. Repairing highways.—By a Wisconsin statute, railroad companies are authorized to construct their road-beds across, along or upon highways, on condition that they restore such highways to their former state of usefulness. The duty is imposed by law upon towns to repair highways within their limits and to remove obstructions therefrom. It has been held that when a railroad company has, in constructing its road-bed along and upon a highway within a town's limits, practically destroyed the highway, the town has such an interest in the preservation and protection of the highway as will enable it to maintain an action for an injunction to compel the company to restore the highway to its former state of usefulness.⁴

§ 1079. Bridges.—In Missouri the mode of contracting by a county for the erection of bridges as provided in the statutes is by an order, a letting to bidders, and an approval of the bid by the county court; then a county authority known as bridge commissioner makes the contract formally with the contractor. To bind a county on a contract for the erec-

¹ *In re Roads in Sadsbury Tp. (Pa.)*, 23 Atl. Rep. 772.

² *In re Road in Roaring Brook Tp. (Pa.)*, 21 Atl. Rep. 411.

³ *Calder v. Police Jury (La.)*, 10 So. Rep. 726.

⁴ *Town of Jamestown v. Chicago &c. R. Co.*, 69 Wis. 648; s. c., 34 N. W. Rep. 728; following *Sheboygan v. Railroad*, 21 Wis. 675; distinguishing *Milwaukee v. Railway*, 7 Wis. 85.

tion of a bridge, the signing of the contract by the bridge commissioner is not essential where it appears that the county court approved the bid for the work and the contractor signed the contract, and that the bridge commissioner in the matter acted for the county.¹ Although a bridge commissioner has no power to make any contract differing in any substantial respect from the bid approved by the county court, the building of a bridge pursuant to the plans and specifications being under his direction, unimportant changes made to meet unforeseen exigencies are allowable.²

§ 1080. Construction of bridges.— Though a commissioner of highways may have exceeded his powers in making a contract for the erection of a bridge before the highway of which the bridge will form a part has been laid out, yet, after such highway has been laid out, he may cause the bridge to be constructed at the point of intersection with the stream, and for that purpose may carry out the former contract.³ Where the ordinary let out the building of a county bridge to one who was not the lowest bidder, the court is justified in refusing to do more than grant an injunction against paying the contractor more than the amount of the lowest bid, the bridge having been built and accepted by the county.⁴ A contractor, after drawing the specifications for a township bridge, and being specially informed as to the sum desired to be expended in its construction, bid on it, and, being the lowest bidder, was awarded the contract, and built the bridge without having

¹ *Bryson v. Johnson County* (1889), 100 Mo. 76; s. c., 13 S. W. Rep. 239.

² *Bryson v. Johnson County* (1889), 100 Mo. 76; s. c., 13 S. W. Rep. 239, in which case the court based the right of the contractor to a recovery upon the statute of the State which provides that "if a claim against a county be for work and labor done or materials furnished in good faith by the claimant, under contract with the county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such

work, labor and material, though such authorities or agent may not, in making such contract, have pursued the form of proceeding prescribed by law." Cf. *Heidelberg v. St. Francois County*, 100 Mo. 69. See, also, *Walcott v. Lawrence County*, 26 Mo. 272; *Johnson v. Wilson*, 2 N. H. 202; *Johnson v. District*, 67 Mo. 319; *Maupin v. County*, 67 Mo. 327.

³ *Huggans v. Riley*, 51 Hun, 501; s. c., 4 N. Y. Supl. 282.

⁴ *Crabtree v. Gibson*, 78 Ga. 290; s. c., 3 S. E. Rep. 16.

given "good and sufficient security for the performance of the work," as required by the Michigan statutes. The bridge was never accepted or used by the township. It was held that there was no valid contract.¹ In an action by the contractor for building a bridge, under an act validating irregular proceedings of the town officers for its erection, evidence of the proceedings of the town authorities referred to in the act were admissible to show on what the ratification by the legislature was founded.² A contract, made by bridge commissioners of a county, to pay a certain sum for the erection and completion of a bridge, as fast as the money is collected by the tax collector, though not negotiable by the law merchant, is assignable, and under the Tennessee statutes the assignee can sue thereon in his own name; and the assignment is completed by indorsement thereof on the contract and delivery of the instrument; and notice of the assignment is not necessary to hold the commissioners liable.³

§ 1081. Agents of counties in the construction of bridges in New York.—Although the New York statute which provides that county boards may authorize towns to build bridges and issue their bonds in payment therefor does not expressly confer such power of appointment, the county board may, in its resolution authorizing the building of a bridge, appoint commissioners to supervise its construction.⁴ Statutes of New York investing the commissioner of highways with the care, superintendence, repair and improvement of high-

¹ *Mackey v. Columbus Township*, 71 Mich. 227; s. c., 38 N. W. Rep. 899.

² *Wrought Iron Bridge Co. v. Town of Attica*, 2 N. Y. Supl. 359.

³ *Smith v. Hubbard*, 1 Pickle, 306; s. c., 2 S. W. Rep. 569.

⁴ *Barker v. Town of Oswegatchie* (1890), 10 N. Y. Supl. 834. See, also, *People v. Meach*, 14 Abb. Pr. (N. S.) 429, where the court, considering a statute on this subject, said:—"The objection that the commissioners are not the proper agents of the board of supervisors to execute the power of building the bridge, and that this

should be executed by town or village authorities, I regard as unfounded. The supervisors have the power, and may execute it in any way that satisfies their sound discretion. No particular set of agents is required by the statute or by the general law. The practice of doing it by commissioners is a very general one, and approved by usage of long standing. I do not regard it as the usurpation of an office, but the execution of an agency." *Kirkwood v. Newburg*, 45 Hun, 323.

ways and bridges within his town, as well as charging him with the custody and disbursement of whatever money is raised by the town for those purposes, where a town meeting votes to raise and appropriate a sum of money for the erection of a bridge across a stream, the commissioner of highways is charged with the duty to erect it and to make appropriate contracts therefor in the absence of any action placing the work in the hands of other agents.¹

§ 1082. Sewers.—The commissioners of highways have implied authority, under the Illinois statutes, to allow a village to construct a sewer in a highway in their town.² The fact that the outlet for a system of sewers provided for by an ordinance passes over private property would not invalidate the ordinance.³ But where a trunk sewer is solely for the benefit of the inhabitants of a particular town, it cannot be constructed through the street of another without the consent of the owners of the soil, or, in the absence of such consent, without the condemnation of such owners' rights as provided in the statute authorizing its construction.⁴

§ 1083. Construction of sewers.—A village in Illinois may by ordinance provide for the construction of a sewer beyond its territorial limits.⁵ The power by the statute being expressly given to make such a local improvement within its borders, the power to secure an outlet for it beyond the borders follows necessarily by implication.⁶ And it is not necessary that the title to the land to be taken for a sewer should be acquired before passing an ordinance for the construction of a sewer by special assessment.⁷ Where the owners of premises specially

¹ *Berlin Iron Bridge Co. v. Wagner* (1890), 10 N. Y. Supl. 840. See, also, *Mather v. Crawford*, 36 Barb. 564; *Huggans v. Riley*, 4 N. Y. Supl. 282; *People v. Meach*, 14 Abb. Pr. (N. S.) 429; *Boots v. Washburn*, 79 N. Y. 207.

² *Cochran v. Village of Park Ridge* (Ill.), 27 N. E. Rep. 939.

³ *Burbans v. Village of Norwood Park* (Ill.), 27 N. E. Rep. 1088.

⁴ *Van Brunt v. Town of Flatbush*, 128 N. Y. 50; s. c., 27 N. E. Rep. 973, reversing 13 N. Y. Supl. 545.

⁵ *Maywood Co. v. Village of Maywood* (Ill., 1892), 29 N. E. Rep. 704, following *Shreve v. Town of Cicero*, 129 Ill. 226; s. c., 21 N. E. Rep. 815.

⁶ *Maywood Co. v. Village of Maywood* (Ill., 1892), 29 N. E. Rep. 704.

⁷ *Village of Hyde Park v. Barden*, 94 Ill. 26; *Holmes v. Village of Hyde Park*, 121 Ill. 129; s. c., 13 N. E. Rep. 540; *Hunerberg v. Village of Hyde*

assessed for a proposed public improvement appear and file objections to the confirmation of the assessment, they thereby waive any and all defects in the notice of application for judgment.¹

§ 1084. *The same subject continued.*—A city being authorized by its charter to build a sewer whenever it may be necessary for sanitary or other purposes is not precluded from building a sewer and assessing the cost to lot-owners by the fact that property-holders in the district have constructed a private sewer, irrespective of the cost of this private sewer.² Where a charter of a city requires, in the construction of a sewer, that the size thereof shall be prescribed by ordinance, but there is no such requirement in regard to the inlets or man-holes, it is not necessary to specify in the ordinance matters of detail relating to the construction of such inlets and man-holes.³

§ 1085. *Contracts for construction of sewers.*—A contract for the construction of a sewer in Kansas City provided that the contractor should be responsible for all damages to persons or property from negligence, and indemnify the city against all claims for damage on account of such neglect; and the sureties agreed that he should faithfully perform the contract. It was held that as the charter of the city requires that such contracts should contain a covenant for the payment of laborers, to be guarantied by sureties, and gave laborers the right to an action thereon, the bond, apart from the covenant

Park, 130 Ill. 156; s. c., 22 N. E. Rep. 486.

¹ Walker v. City of Aurora (Ill., 1892), 29 N. E. Rep. 741; Murphy v. City of Peoria, 119 Ill. 509; s. c., 9 N. E. Rep. 895; Quick v. Village of River Forest, 130 Ill. 323; s. c., 22 N. E. Rep. 816.

² City of St. Joseph v. Owen (Mo., 1892), 19 S. W. Rep. 713.

³ City of St. Joseph v. Owen (Mo., 1892), 19 S. W. Rep. 713. The commissioners of a sewer district under the statutes of Arkansas have no authority except to construct the sew-

ers and pay for their construction. When they have then turned them over to the city, they are subject to the control of the city, and the board of commissioners have no further control over them. Therefore they have no authority to contract or bind themselves as a board or the sewer district for water furnished for flushing the sewers in the district. Pine Bluff Water and Light Co. v. Sewer Dist. No. 1 (Ark., 1892), 19 S. W. Rep. 576; Martin v. Hilb, 53 Ark. 300; s. c., 14 S. W. Rep. 94.

for the benefit of laborers; was for the benefit of the city only, and an action against the sureties on their contract for damages for injuries sustained by the carelessness of the contractor or his employees could not be maintained by a third person.¹ Though a contract with a city to construct a sewer provides that the work shall be done to the satisfaction of the board of public works, the contractor, in an action against the city for its refusal to permit him to perform part of the work, need not show a compliance with this provision; the action not being for work done under the contract. And a provision in the contract that the board of public works shall adjudicate the amount earned by the contractor, and the damages suffered by the city from his non-performance of the contract, did not necessitate an adjudication of the contractor's damage arising from the city's breach of contract.²

§ 1086. Power as to drains and sewers discretionary.—The power of a municipal corporation to determine for itself the best method of constructing drains and sewers cannot be interfered with by the courts, for it is a discretionary power committed to the municipal authorities. As long as the corporate authorities keep within the discretion conferred upon them they are the exclusive judges of the plan and method of constructing drains and sewers.³

¹ *Kansas City v. O'Connell*, 99 Mo. 357; s. c., 12 S. W. Rep. 791.

² And a provision in the contract authorizing the board of public works to suspend or relet the construction of the sewer if the work should be improperly or imperfectly performed did not authorize it to arbitrarily shorten the sewer against the contractor's protest. *Markey v. City of Milwaukee*, 76 Wis. 349; s. c., 45 N. W. Rep. 28. A contract with a city for the construction of a sewer provided that the work should be commenced on such day as the commissioner of public works should designate, and be completed within sixty days thereafter, excluding the time during which work might be

delayed by difficulties that could not be foreseen or avoided, or by any act or omission of the city, "all of which shall be determined by the said commissioner of public works, who shall certify to the same in writing." It was held that the obtaining of such certificate was not a condition precedent to the maintenance of an action to recover moneys earned under the contract. *Toop v. City of New York*, 13 N. Y. Supl. 280, following *Dady v. Mayor &c.*, 10 N. Y. Supl. 819.

³ *Leeds v. City of Richmond*, 102 Ind. 372; *City of Kokomo v. Mahan*, 100 Ind. 242; *Macy v. City of Indianapolis*, 17 Ind. 267. See, also, *Town of Sullivan v. Phillips*, 110 Ind. 320; *Weis v. City of Madison*,

§ 1087. **Local assessments for drains and sewers.**—The statute of Maine relating to drains and sewers was held constitutional over the objection that it was repugnant to the provision which requires taxes to be “assessed equally, according to the just value thereof.” The Supreme Court said:—“Some objects of taxation, however, that are of public utility, also operate to bestow some particular and special benefit upon particular interests, and so far as this benefit is special and beyond and apart from that enjoyed by the community in general, and by the recipient as a member thereof, it is not a public work or purpose that must be provided for from the public revenue or taxes, that the constitution declares shall be assessed on property, ‘equally, according to the just value thereof,’ but it may be charged to or assessed upon interests according to the benefits bestowed. The purpose of the constitutional provision is to equalize public burdens and not to assume those of individuals.”¹

75 Ind. 241; s. c., 39 Am. Rep. 135; *Comm’rs v. City of Seymour*, 79 Ind. 491; s. c., 41 Am. Rep. 618; *City of Evansville v. Decker*, 84 Ind. 325; s. c., 43 Am. Rep. 86; *Hebron G. R. Co. v. Harvey*, 90 Ind. 192; s. c., 46 Am. Rep. 199; *Lipes v. Hand*, 104 Ind. 503, 508; *Pettigrew v. Village of Evansville*, 25 Wis. 223; *Gregory v. Burk*, 35 Alb. L. J. 278. A city is liable for negligence in failing to keep a sewer in repair as well as for negligence in its construction. *City of Frostburg v. Duffy*, 70 Md. 47; s. c., 16 Atl. Rep. 642. See, as to the care required of a corporation in construction of its public improvements, *City of Boulden v. Fowler*, 11 Colo. 396; s. c., 18 Pac. Rep. 337; *Dewein v. City of Peoria*, 24 Ill. App. 396; *City of Champaign v. Forrester*, 29 Ill. App. 117; *Borough of Bethlehem v. Haus* (Pa.), 26 W. N. C. 348; s. c., 19 Atl. Rep. 437; *Topeka Water Supply Co. v. City of Potwin Place*, 43 Kan. 404; s. c., 23 Pac. Rep. 578, an action for discharging sewage into a stream furnishing the water

supply; *City of Elgin v. Hoag*, 25 Ill. App. 650; *Middlesex Co. v. City of Lowell*, 149 Mass. 509; s. c., 21 N. E. Rep. 872; *Maguire v. City of Cootersville*, 76 Ga. 84.

¹*City of Auburn v. Paul* (Me., 1892), 24 Atl. Rep. 817, in which it was held that a land-owner may be required to contribute towards the cost of a public work a sum equal to the increased value of his property by reason of peculiar and special benefits thereby given, in addition to those bestowed upon him in common with the general public. See, also, *State v. Telegraph Co.*, 73 Me. 518-526; *Dorgan v. Boston*, 12 Allen, 223; *Norwich v. County Comm’rs*, 13 Pick. 60; *Goddard, Petitioner*, 16 Pick. 504; *Attorney-General v. Cambridge*, 16 Gray, 247; *Morse v. Stocker*, 1 Allen, 150, 159; *Hingham & Quincy Turnpike Co. v. County of Norfolk*, 6 Allen, 353, 359; *Butler v. Worcester*, 112 Mass. 541-555; *Holt v. Somerville*, 127 Mass. 408, 412. And where the statute merely imposes a tax for benefits, involving no question arising

§ 1088. **Drainage continued.**—The statutes of Wisconsin providing for drainage have been considered in several cases by the Supreme Court of that State, and have been adjudged to be valid, as they were an exercise of the police power of the State.¹ In the proceedings for drainage under the drainage act of Wisconsin, a town, in moving to vacate the assessments made upon it, is held to the same rules that would govern if it were seeking in an equitable action to set aside and cancel the assessments. So if a town has already, when it moves to vacate such an assessment, apportioned the amount of the assessment to the tax-payers of the town, levied the same upon them or their property, collected a portion and is proceeding to collect the balance, it cannot sustain its motion. If there is any remedy then, it is in an action by individual tax-payers or owners of the property charged with the taxes, and not in the town or municipality.² The petition, in proceedings under the drainage act of Wisconsin, for the improvement need not state that the town, which it is proposed to assess for benefits resulting to it, as a whole will be benefited thereby, nor specify the nature of the benefits.³ The court being required by the drainage act of Wisconsin to make an order prescribing the notice to be given of the time and place of hearing the petition for the improvement, the publication of the order itself, containing all the essentials of a valid notice instead of a formal notice, is a substantial compliance with the statute.⁴ In a proceeding under the statute of Michigan for drainage, the requirement that the petition for the widening of a drain should show that one or more of the petitioners were assessed for its construction is jurisdictional, and a petition failing to show such facts is fatally defective.⁵

under the exercise of eminent domain, no appeal to a jury need be provided for. *Howe v. Cambridge*, 114 Mass. 388; *Chapin v. Worcester*, 124 Mass. 464. Assessments of the nature referred to in the text are discussed and approved in *Dyar v. Corporation*, 70 Me. 515.

¹ *Town of Muskego v. Drainage Commissioners* (Wis., 1890), 47 N. W. Rep. 11. Following *Bryant v. Robins*, 70 Wis. 258; s. c., 35 N. W.

Rep. 545; *State v. Stewart*, 74 Wis. 629; s. c., 43 N. W. Rep. 947.

² *Town of Muskego v. Drainage Comm'rs*, 78 Wis. 40; s. c., 47 N. W. Rep. 11.

³ *Town of Muskego v. Drainage Comm'rs*, 78 Wis. 40; s. c., 47 N. W. Rep. 11.

⁴ *Town of Muskego v. Drainage Comm'rs*, 78 Wis. 40; s. c., 47 N. W. Rep. 11.

⁵ *Tinsman v. Monroe Probate Judge*,

§ 1089. Liability of the corporation.—The act of determining the dimensions of a culvert is a ministerial and not a judicial act, and a city is liable for all damages caused by the insufficiency of the dimensions.¹ Where a municipal corporation collects in one channel a great body of water, it must use reasonable care to provide an outlet for it.²

§ 1090. The same subject continued.—Municipal corporations are liable for negligence in devising a plan for construction of a sewer, but there is no liability unless there is negligence.³

82 Mich. 562; s. c., 46 N. W. Rep. 780.

¹ *Young v. City of Kansas*, 27 Mo. App. 101. In *Collins v. City of Waltham*, 151 Mass. 196; s. c., 24 N. E. Rep. 327, an action for damages caused by the flowage of land from open gutters in the streets, the city was held not liable where it did not appear that the gutters brought down more water than the streets would otherwise have done or brought it down in a different manner. In *Hazzard v. City of Council Bluffs*, 79 Iowa, 106; s. c., 44 N. W. Rep. 219, where it appeared that plaintiff's horse was injured by stepping on a brick washed into the street by the overflow from a culvert, it was held error to instruct the jury that the city was not liable for the reason that such an injury could not have been foreseen and apprehended as a result of the insufficient capacity or lack of repair of the culvert. *City of Kearney v. Thoemanson*, 25 Neb. 147; s. c., 41 N. W. Rep. 115; *City of Seymour v. Comm'rs*, 119 Ind. 148; s. c., 21 N. E. Rep. 549, where the defective construction of a ditch caused filthy and poisonous waters to remain stagnant, and poisonous and unwholesome vapors therefrom permeated and made impure the air within plaintiff's dwelling, generating malaria and disease,

and rendering the house uninhabitable. *Gross v. City of Lampasas* (Tex.), 11 S. W. Rep. 1086; *Sheridan v. City of Salem*, 148 Mass. 196; s. c., 19 N. E. Rep. 172; *Stoddard v. Village of Saratoga Springs*, 4 N. Y. Supl. 745, where the contract for the construction of the sewer having been made by the village, the fact that it raised the amount expended by an assessment on the adjoining owners was held not to alter its validity. Nor could the city protect itself on the ground that it was not authorized to construct the sewer. *Buchanan v. City of Duluth*, 45 Minn. 402; s. c., 42 N. W. Rep. 204; *Collins v. City of Waltham*, 151 Mass. 196; s. c., 24 N. E. Rep. 327, in which case, it being alleged that further damage was caused by the stoppage of a drain in a highway, it was held that it must be shown that it was the duty of the city to keep the drain clear, and that if kept clear the damage would not have occurred.

² *Rice v. City of Evansville*, 108 Ind. 7; s. c., 58 Am. Rep. 22; *Lipes v. Hand*, 104 Ind. 503; *City of Evansville v. Decker*, 84 Ind. 325; s. c., 43 Am. Rep. 86; *Weis v. City of Madison*, 75 Ind. 241; s. c., 39 Am. Rep. 135; *City of Indianapolis v. Lauzer*, 38 Ind. 348.

³ *Rice v. City of Evansville*, 108

§ 1091. The same subject continued — Rights in percolating water.—In an action against a city in Ohio for damages caused by the destruction of pipes which had been placed in the

Ind. 7; s. c., 58 Am. Rep. 22; City of North Vernon *v.* Voegler, 103 Ind. 314; City of Crawfordsville *v.* Bond, 96 Ind. 236; City of Evansville *v.* Decker, 84 Ind. 325; s. c.; 43 Am. Rep. 86; Cummins *v.* City of Seymour, 79 Ind. 491; s. c., 41 Am. Rep. 135; Weis *v.* City of Madison, 75 Ind. 241; s. c., 39 Am. Rep. 135; City of Indianapolis *v.* Huffer, 30 Ind. 235; Stackhouse *v.* City of La Fayette, 26 Ind. 17; s. c., 89 Am. Dec. 450; City of Logansport *v.* Wright, 25 Ind. 512. See, as to liability of corporations for negligence in the construction of drains, sewers, etc., and injury to private property resulting therefrom, under various statements of facts, Haney *v.* City of Kansas, 94 Mo. 334; s. c., 7 S. W. Rep. 417; Addy *v.* City of Janesville, 70 Wis. 401; s. c., 35 N. W. Rep. 931; Harrington *v.* City of Wilmington (Del.), 12 Atl. Rep. 779; Levy *v.* Salt Lake City (Utah), 16 Pac. Rep. 598, affirming 1 Pac. Rep. 160; Kiernan *v.* Jersey City, 50 N. J. Law, 246; Beach *v.* City of Elmira, 11 N. Y. Supl. 913; Trowbridge *v.* Town of Brookline, 144 Mass. 139; s. c., 10 N. E. Rep. 796; Loughran *v.* City of Des Moines, 73 Iowa, 382; s. c., 34 N. W. Rep. 172, where the city was held liable in damages at the suit of the property owner, not only for the decreased rental value of the premises, but also for the loss of time and expenses incurred by reason of sickness produced by noxious odors resulting from the contents of a sewer being thrown upon the premises, which was caused by faulty construction of the sewer. Daggett *v.* City of Cohoes, 7 N. Y. Supl. 882; following: Siefert *v.* City of Brooklyn, 101 N. Y. 136; s. c., 4 N. E. Rep. 321; Miller *v.* City of Morristown (N. J.), 20 Atl. Rep. 61; City of Frostburg *v.* Duffy, 70 Md. 47; s. c., 16 Atl. Rep. 642; Pottner *v.* City of Minneapolis, 41 Minn. 73; s. c., 42 N. W. Rep. 784; Kosmak *v.* City of New York, 53 Hun, 329; s. c., 6 N. Y. Supl. 453; Pearson *v.* City of Duluth, 40 Minn. 488; s. c., 42 N. W. Rep. 394; Boston Belting Co. *v.* City of Boston, 149 Mass. 44; s. c., 20 N. E. Rep. 320; Elliott *v.* City of Oil City (Pa.), 18 Atl. Rep. 553; Richlicke *v.* City of St. Louis, 98 Mo. 497; s. c., 11 S. W. Rep. 1001; Butler *v.* Village of Edgewater, 6 N. Y. Supl. 174; City of Peoria *v.* Crawl, 23 Ill. App. 154, an action for damages from an overflow of a culvert maintained by the city, where it was held that the plaintiff need not prove that the culvert was built by persons employed by the city, as this would be presumed: Briegel *v.* City of Philadelphia, 26 W. N. C. 253; s. c., 19 Atl. Rep. 1038, an action for damages occasioned by the negligent plumbing and drainage of a school building, whereby water and filth were deposited in the neighboring cellars; Young *v.* City of Kansas, 27 Mo. App. 101; Spangler *v.* City &c. of San Francisco, 84 Cal. 12; s. c., 23 Pac. Rep. 1091, holding that it was no defense that the flow was unusual where it appeared that the sewer would not have carried off all the water if it had been kept in repair; Anderson *v.* City of Wilmington (Del.), 19 Atl. Rep. 509, where the city was held liable where the flooding of a cellar was in consequence of the negligent work of a plumber acting under its license in laying a private drain from an adjoining house to the public main in the street.

earth and used by the owner of the land for years for the purpose of carrying water from a spring on his lands to a mill, and for damages to the spring which it was contended had received its supply of water by percolation of the soil in the construction of a sewer by the city, the Supreme Court of Ohio has made some rulings of importance as to powers of a city council in construction of sewers and as to liability of a city in consequence of such construction, as follows:—The statute of Ohio give cities power to build sewers; and sewerage being one of the legitimate uses to which a public street may be devoted, the construction in such a street of a sewer, if done in a lawful manner, is an authorized use by a city of the street.¹ There can be no enjoyment of a street of a city adverse to the city under a license from its governing authority. A city has no power by grant to give any individual any rights in one of its streets inconsistent with the future legitimate uses of the street by the city.² And no right by prescription can exist as to percolating water, and injury to the spring by draining it or cutting off the water supplied to it by percolation was not *per se* actionable.³

§ 1092. Massachusetts decisions as to assessment for sewers.—Under the Massachusetts statute authorizing the board

¹ *Elster v. City of Springfield* (Ohio, 1892), 30 N. E. Rep. 274; *Cincinnati v. Penny*, 21 Ohio St. 499.

² *Elster v. City of Springfield*, *supra*, the court holding, according to the doctrine of the text, that no right by prescription to maintain pipes in a street would vest in the plaintiff, although he had enjoyed the use more than twenty-one years, and that any damage resulting from removal of those pipes, and thus interrupting the flow of water through them, would be *damnum absque injuria*.

³ *Elster v. City of Springfield*, *supra*. The statute of Ohio which provides that no contract involving the expenditure of money can be entered into by a municipality unless

the clerk shall certify that the money required by the contract is in the treasury to the credit of the fund is intended for the protection of taxpayers by checking municipal extravagance and the incurring of indebtedness, and is not intended to attach liability to a city for negligence where the city would not be liable. Hence, the mere fact that there was no money in the treasury to pay the cost of the sewer at the time of making the contract would not make the city liable, even though there was negligence in its construction. Nor would the fact that the act under which the city was proceeding to raise the money was unconstitutional give a right of action to plaintiff on the ground of negligence in the con-

of aldermen of Boston to construct and maintain common sewers, and the statute which provides that the board may take and divert the water of a stream within the city and devote the same to the purposes of sewerage and drainage, it has been held such board has power to order a single structure to serve both as a conduit for the stream and as a common sewer, and that they may assess under the general statutes, upon those benefited thereby, their proportional part of the expenditure which was necessary for the structure as a sewer.¹

§ 1093. Use of street for public drain.— Where the borough charter in Pennsylvania empowers the council to authorize the construction in the streets of sewers, etc., the council may authorize a citizen to construct a private under-drain along a public street without the consent of an abutting lot-owner.²

§ 1094. Improvements by street-railway companies.— A municipal corporation which by an ordinance of its governing

struction of the sewer. *Elster v. City of Springfield (Ohio)*, 30 N. E. Rep. 274.

¹ *Gray v. Board of Aldermen of Boston (Mass., 1885)*, 31 N. E. Rep. 734. In ascertaining damages caused to a land-owner by condemning a strip of his land for sewer purposes, the jury should consider not only the value of the property taken, but also the effect of the taking on that which is left, with reference to all the uses to which it was before adapted; and in estimating the value of that which is taken they may consider all the uses to which it might properly have been applied if it had not been taken. *Maynard v. City of Northampton (Mass., 1892)*, 31 N. E. Rep. 1062. So, in this case, there was evidence that the property would have been valuable for the extension of a near-by factory, and upon the city introducing evidence that an extension of the factory would be very expensive because the land in question was a steep hillside, composed of clay and quicksand, it was held that the judge

might properly, in his discretion, allow the land-owner to show that such extension could be erected without difficulty and at reasonable cost. See, also, *Edmonds v. Boston*, 108 Mass. 535; *Chase v. Worcester*, 108 Mass. 60.

² *Wood v. McGrath (Pa., 1892)*, 24 Atl. Rep. 682. It was argued in this case that the right of the council to authorize the digging of the drain was limited to public purposes only, and could not be exercised in favor of an individual citizen for a private purpose. The court said that this was answered by *Smith v. Simmons*, 103 Pa. St. 32, in which it was held that it was competent for the authorities of a borough to grant permission to a city to dig up a street of the borough for the purpose of laying a water pipe to lead water from a spring to his private house, and that the digging of the necessary ditch in the street for that purpose was not *per se* a nuisance. Repeated in *Borough v. Simmons*, 112 Pa. St. 384; s. c., 5 Atl. Rep. 434.

board authorizes a street-railroad company to use its streets for a track, and imposes upon the company the burden of reconstructing a street in which it is to lay its tracks "with the same kind of material used by the [corporation] in the remaining portion of the streets," where this condition has been performed by the company, cannot compel the company, upon the corporation afterwards determining to change the material of its pavement, to construct its portion thereof of the new material.¹

§ 1095. The same subject continued.—The condition upon which a street-railroad company was by the legislature and a city given the right of constructing its track upon a street of the city and to run its cars thereon was that it should keep the surface of the street within the rails, and for one foot outside thereof, and to the extent of the ties, "in good and proper order and repair." This company had operated its railroad for about eighteen years without any pavement between the rails. The city passed an ordinance providing for ordering its streets, so far as street railroads occupied them, to be paved, and in case the companies declined, to do the work itself and assess the companies or bring action against them for the cost. This company was ordered to pave between its tracks with asphalt. It was held, under the circumstances of this case, that the city could not recover the cost of paving between the tracks with asphalt, as it did not appear on the trial that at the time the city ordered the pavement the space occupied by the railroad was not in good order

¹ *Borough of Norristown v. Norristown Pass. Ry. Co.* (Pa., 1892), 23 Atl. Rep. 1060. An ordinance of a city conferring the right upon a railroad company to inclose and occupy . . . that portion of the levee, batture and wharves in the city in front of its riparian property, acquired or to be acquired, between certain streets, and to erect and maintain thereon such ferry facilities, wharves, piers, warehouses, tracks, depots, etc., as should be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business, does not

authorize the placing of piles or any other structure outside of the lines of the city wharf. The right to erect these improvements is confined to so much of the levee and wharf of the city as lay in front of the riparian property of the railroad company, and does not extend beyond the wharf line. *Texas & Pac. Ry. Co. v. City of New Orleans* (1889), 40 Fed. Rep. 111. In this case, the river being a navigable stream, was within the exclusive control of congress, and neither the city nor the State could authorize any obstruction of its navigation.

and repair or that the pavement was necessary. Further, that the enactment by the city of the ordinance requiring the pavement of the portion of the street occupied by the railroad company was not presumptive evidence of the necessity for such improvement.¹

§ 1096. Street-railway company bound to repair.— A charter granted by the governing authorities of a municipality to a railway company to construct and operate a street railway within its corporate limits constitutes a contract between such company and the municipality.² Such charter is to be strictly construed against the railway company, and it has no doubtful rights under such charter; for where there are doubts they are construed against the grantee and in favor of the municipality.³ A street-railway company is bound to keep in repair that portion of the street used by it, even in the absence of a stipulation in its charter requiring it to do so; but there is doubt as to whether it is compelled to improve the street, as ordered by the city, in the absence of a contract to that effect.⁴

§ 1097. The same subject continued.— A passenger-railway company was bound by its charter to keep the streets through which it was constructed in "perpetual good repair at the proper expense of said company," subject to the regulations of the council of the city as to paving, repairing, etc.; and an ordinance of the city provided that the "entire cost and expense of maintaining, paving, repairing and repaving that may be necessary upon any road, street, avenue or alley occupied by them" should be upon the railroad companies

¹ *City of Binghamton v. Binghamton &c. Ry. Co.* (1891), 16 N. Y. Supl. 225.

² *Chicago v. Sheldon*, 9 Wall. 50; *Coast-Line R. Co. v. Mayor &c.*, 30 Fed. Rep. 646; *State v. Corrigan &c. Street Ry. Co.*, 85 Mo. 263; *District of Columbia v. Washington &c. R. Co.*, 4 Am. & Eng. R. Cas. 161; *Farrar v. City of St. Louis*, 80 Mo. 379; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Greenwood*

v. Freight Co., 105 U. S. 13; *New Jersey v. Yard*, 95 U. S. 104.

³ *Citizens' Ry. Co. v. Jones*, 34 Fed. Rep. 579; *Mayor &c. v. Ohio &c. R. Co.*, 26 Pa. St. 355; *Birmingham &c. Ry. Co. v. Birmingham &c. Ry. Co.*, 79 Ala. 465; *West Philadelphia &c. Ry. Co. v. City of Philadelphia*, 10 Phila. 70.

⁴ *Western Paving & Supply Co. v. Citizens' St. R. Co.* (1891), 128 Ind. 525. See, also, *Elliott on Roads and Streets*, 594.

traversing its streets, and by other provisions subordinated the companies to the general authority and power of the municipality over its streets. An ordinance of the city, later in date, provided that thereafter it should "be unlawful to pave with cobble or rubble pavement any street in [the city], or to pave the gutter of any street with bricks." The city repaved one of its streets traversed by this company with an improved kind of granite block, and in an action against the company for the cost of the same the company, among other defenses, questioned the right of the council to determine the necessity for repairing or repaving, etc., of the streets. The Supreme Court of Pennsylvania on this point said:—"By whom is the necessity for repairing or repaving, etc., to be determined? Certainly not by the company itself, but by the municipal authorities. As a general rule it is their special province to determine when repaving is needed, and how it shall be done; whether with the same kind of material as before, or with a different and better material. It was never intended to transfer the duty of determining these matters, or either of them, from the municipal authorities to any one else. The proposition that, because cobble-stone was the kind of pavement ordinarily in use when defendant company was chartered, it is in no event bound to repave with any other and more expensive kind of material, etc., is wholly untenable. It cannot be entertained for a moment. It was never contemplated that the railway company would continue to exist and perform its functions in a cobble-stone age. It was called into being with the view of progress. The duties specified in the charter were imposed with reference to the changes and improved methods of street paving which experience might sanction as superior to and more economical than old methods. In other words, the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions. The city authorities have just as much right to require it to repave, at its own expense, with a new, better and more expensive kind of pavement as they have to cause other streets to be repaved in like manner at the public expense."¹

¹ Philadelphia v. Ridge Ave. Pass. Ry. Co. (1891), 143 Pa. St. 444, 471; s. c., 22 Atl. Rep. 695.

§ 1098. **Contracts — Construction of, etc.**— A contract for street paving provided that “all loss or damage arising out of the nature of the work, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same,” should be cast on the contractor. It was held that the bad condition of the street necessitating additional material to keep the pavement up to grade was a “difficulty” to be borne by the contractor.¹ Where the law under which a local improvement is made does not require the contractor to give a bond, and the contract is duly performed, the fact that the contractor’s bondsman was interested in the contract, and was an officer of the city with which the contract was made, does not invalidate the assessment made to pay for such improvement.² Under a New York statute all contracts for work to be done in New York city involving an expenditure of more than \$1,000 must be let to the lowest bidder in a manner fixed by ordinance of the common council; and it was established by ordinance that in all such cases the commissioner of public works should issue proposals and advertise for bids, and, when necessary, cause a survey of the work to be made by a competent engineer, and that the advertisement should state as near as possible the quantity and quality of the work to be done. It was held that an estimate which placed the amount of stone excavation at more than double, and the earth excavation at less than one-half, the actual amount did not form a basis for a valid contract.³

¹ *Murdock v. District of Columbia*, 22 Ct. Cl. 464.

² *Trustees &c. v. Rausch*, 122 Ind. 167; s. c., 23 N. E. Rep. 717.

³ *In re Anderson*, 47 Hun, 203. The California statute in regard to street work in San Francisco providing that in case the assessment for the payment of a contract is adjudged invalid through no fault of the contractor, the board of supervisors shall pay the amount due the contractor out of the street department fund of the city, presupposes a valid contract binding on the city and county; and where it was adjudged by the court that there was no assessment because

there was no contract, it was held that no liability attached to the municipality. *Daly v. City and County of San Francisco*, 72 Cal. 154; s. c., 13 Pac. Rep. 321. The fact that an assessment levied by a village to pay for a public improvement is invalid furnishes no ground to the contractor for such improvement to abandon his contract, where the charter of the village authorizes it to make new assessments in lieu of the one declared void, and the village is not shown to be in default in the matter. *Village of Morgan Park v. Gahan* (Ill.), 26 N. E. Rep. 1085.

§ 1099. Decisions on particular contracts.—Under the statutes, where the expenditure of more than \$1,000 is involved in any particular work for the city of New York, the work must be awarded by the common council by contract to the lowest bidder, after advertisement for sealed proposals; an ordinance relating to work costing more than \$1,000, and providing that the work is “to be done in such manner as the said commissioners of public works shall deem expedient,” has been held to be on its face an unwarranted delegation of power by the common council, and the assessments made for such work to be void.¹ After the passage of an ordinance for the regulating and grading of a street to a certain point, a contractor contracted with the city to do the work, and entered on the performance thereof. Thereafter the ordinance was amended so as to provide for grading the street only to a point short of the one named in the ordinance. It was held that the amending ordinance did not abrogate the contract or affect its obligation, and until the city acted on the ordinance, and forbade the contractor going on under his contract, he had a right to pursue the work.²

¹*Phelps v. City of New York*, 112 N. Y. 216; s. c., 19 N. E. Rep. 408. A contract for paving a street in a city stipulated that the work was to be approved by the street commissioner, whose certificate was to be conclusive, and that payment was not to be required till after apportionment and assessment of the expense had been approved by the common council. The commissioner's certificate was filed to the effect that the work had been performed in accordance with the contract, but an apportionment and assessment, confirmed by the council, was set aside for irregularities of the city officials. Meanwhile the statute had vested the entire power of apportionment and assessment in the board of apportionment, which refused to make another assessment, on the ground that the work had not been done in accordance with the contract. No power was given to the

board to re-investigate the character of the work. It was held that the city could not resist payment of the contractor on the ground that no apportionment or assessment had been made. *Reilly v. City of Albany*, 112 N. Y. 30; s. c., 19 N. E. Rep. 508. Where it appears that the plans of the proposed improvement were on file when the engineer advertised for proposals, it will also be presumed, in the absence of evidence, that the specifications were also on file, as the law requires. *Knell v. City of Buffalo*, 7 N. Y. Supl. 233. An assessment for laying crosswalks constructed under a contract awarded without advertisement on the same day that other contracts for the same kind of work were awarded for a lower price has been held to be invalid. *In re Rosenbaum*, 6 N. Y. Supl. 184.

²*Ottendorfer v. Fortunato*, 56 N. Y. Super. Co. 495; s. c., 4 N. Y. Supl. 629.

§ 1100. The same subject continued — **Lowest bidder, etc.**— A statute of New York provided for the awarding of contracts for doing work for the city of New York to the lowest bidder. An advertisement for bids for grading a public street gave only estimates of the quantities of rock and earth to be removed; the official who made the estimate being ignorant of the amount of work to be done and the proportion of rock and earth to be removed. It was held that a contract based on such estimates was not a contract with the lowest bidder, and was void.¹ A bond given to secure the performance of a contract to construct a sewer was conditioned to pay the excess in the expense on completion of the contract by the commissioner of public works, "on notice from the commissioner of the excess so due." It was held that the failure of the commissioner to give the contractor notice of the amount he was required to pay was ground for a nonsuit in an action on the bond.²

§ 1101. The same subject continued — **Advertisements for bids, etc.**— The Iowa statute relating to the letting of contracts for the paving and grading of streets in cities provides that "all such contracts shall be made by the council in the name of the city, . . . and shall be made with the lowest bidder or bidders, upon sealed proposals, after public notice, . . . which notice shall contain a description of the kind and amount of work to be done and materials to be furnished, as nearly accurate as practicable." It was held that this statute implies a determination by the council in advance of the publication of notice of the kind of material to be used in the proposed work; and an advertisement for bids "for all the different kinds of modern pavements now in use," regardless of the material of which it might be composed, was not a compliance with the statute, and invalidated an assessment made against abutting property to pay the cost of the

¹ *Reilly v. City of New York*, 54 N. Y. Super. Ct. 463. Where the statutory requirement that a resolution for an improvement shall be published before a contract is made for the improvement is not complied with, the city is not liable to the con-

tractor for not allowing him to go on under the contract thus unlawfully made. *Jardine v. New York* (1885), 11 Daly, 116.

² *City of New York v. Reilly*, 13 N. Y. Supl. 521.

paving.¹ After bids for constructing a sewer were opened, and the council had passed a resolution awarding the contract to the lowest bidder, who failed to enter into the contract, it was not necessary to advertise again, as the council might, at its next meeting, rescind the former resolution and award the contract to the next lowest bidder; as the New York statute provides that at the next meeting after proposals are made they shall be presented to the common council and be opened and considered; that "the common council may reject any or all of the proposals, if they shall deem it for the interest of the city; and that, if either of said proposals is deemed favorable to the city, the common council may direct the mayor and city clerk to contract with the party whose proposal is accepted."² Certain work was to be done under the direction of the city engineer, and he fixed the grade line on the ground in conformity with the new line alleged by the contractor to have been laid down on the profile; and he in good faith filled the street up to such grade line under the constant supervision of the engineer; who finally approved the work, and certified that it had been performed in accordance with the contract. It was held that there was a practical construction of the contract, which the court could not ignore.³ A contractor entered into a contract with a city to fill and grade one of its streets, in accordance with plans and specifications already prepared by the city engineer. But the roadway as completed by him was two feet lower than the grade line laid down on the original plan. It was conceded that at some time after bids were called for, and the acceptance of the one filed by him, the council determined to have less work done than was provided for in the plans and specifications. But there was no record indicating when this decision was made, and none which clearly showed to what extent the contemplated improvement was changed or abandoned. It was held that testimony was admissible tending to show that at the council meeting at which the contractor's bid was accepted, and at which he was present, a conversa-

¹ *Coggeshall v. City of Des Moines*, 78 Iowa, 235; s. c., 41 N. W. Rep. 617. ³ *O'Dea v. City of Winona*, 41 Minn. 424; s. c., 43 N. W. Rep. 97.

² *Kinsella v. City of Auburn*, 7 N. Y. Supl. 317.

tion took place between members of the council and the engineer, which indicated that there had been a departure from the original plan of improvement as to its character, and that, at some time subsequent to the presentation of the plan to the council and the commencement of the work, the engineer caused a new grade line to be laid down on the profile.¹ There being evidence that by a change in the plan of the work, not provided for by the contract, made by defendant's engineers, additional work had been required at greater expense, it was held to be error to hold that plaintiff made no case for the jury on a paragraph of his complaint claiming compensation for the extra work.² Where the defense in an action by the assignee of a contractor against a city for street improvement is that the contractor had failed to complete the work within the time agreed, whereby the defendant had been caused to expend unnecessary sums for the compensation of the inspector of the work, and there is evidence that the delay resulted from the failure of defendant to furnish grade lines and levels, and that, though it was not bound to do so by the contract, it had undertaken to furnish them voluntarily, and caused the contractor to believe that it would do so, a verdict allowing only part of the inspector's compensation is supported by the evidence.³ In such an action, defendant having filed a counter-claim for an amount alleged to be overpaid on the rock excavation, evidence that the earth with which the excavation had been filled had been removed in several places and the amount of rock excavated calculated from the *data* thus obtained, and found to be less than that for which the contractor had been paid, will warrant the submission of the question to the jury as to whether such overpayment had been made.⁴

§ 1102. Conditions precedent to recovery by contractor, etc.—A street-grading contract provided that the city should retain, from the amount coming to the contractor, inspectors'

¹ *O'Dea v. City of Winona*, 41 Minn. 113 N. Y. 631; s. c., 20 N. E. Rep. 424; s. c., 43 N. W. Rep. 97. 856.

² *Mulholland v. City of New York*, 113 N. Y. 631; s. c., 20 N. E. Rep. 856. ⁴ *Mulholland v. City of New York*, 113 N. Y. 631; s. c., 20 N. E. Rep. 856.

³ *Mulholland v. City of New York*,

fees for such time as the work should remain uncompleted beyond a specified time, but that the time during which the work was delayed by the city, which should be determined by third parties, should be excluded. It was held that it was a condition precedent to the right of the contractor to be relieved from the allowance of such inspectors' fees for the time that the work was delayed by the city, that the matter should be submitted to and determined by such third parties, unless they refused or neglected to act upon it.¹ Where the sewer board of a city properly advertises and receives bids for sewer-pipe, and awards the contract to the lowest bidder, who furnishes the pipe in accordance with the bid, and it is used by the board, the contractor can recover therefor, though the contract was not in writing, in accordance with a provision of the city charter that when the board shall have made their award they shall furnish the city attorney with plans, and he shall draw the necessary contract, and, when approved by the board, it shall be executed by it, under the seal of the city.² It is immaterial that no security for the performance of the contract was given by the contractor, where it does not appear that the board required any, and the charter provides for "good and sufficient security, as required by said board."³ Where a city, by its contract, agrees to pay for an improvement upon its completion and the approval of it by the city, it cannot avoid its liability by delaying to approve the work when it is completed according to the contract.⁴ Where a city charter authorizes the city to contract for improvements only by paying for the improvements by warrants against the property abutting upon the improvements to be paid for, a contract by which the city agrees to pay for an improvement from its general fund, whether an original contract or a modification of one authorized by its charter, is void.⁵ Where, in a contract for the improvement of a street, the city reserves the right to lay or relay any and all water-pipes or sewers

¹ *Phelan v. City of New York*, 119 N. Y. 86; s. c., 23 N. E. Rep. 175.

² *Carey v. City of East Saginaw*, 79 Mich. 73; s. c., 44 N. W. Rep. 168.

³ *Carey v. City of East Saginaw*, 79 Mich. 73.

⁴ *North Pac. Lumbering & Manuf. Co. v. City of East Portland*, 14 Or. 3; s. c., 12 Pac. Rep. 4.

⁵ *North Pac. Lumbering & Manuf. Co. v. City of East Portland*, 14 Or. 3; s. c., 12 Pac. Rep. 4.

during the progress of the work, the contractor cannot recover the additional cost to him of hauling dirt, caused by the laying of a water-main in the street, though the city surveyor promised that he should be paid for such extra work; if the surveyor had authority to bind the city, the promise was without consideration.¹

§ 1103. Indiana decisions as to letting contracts.—The purpose of requiring the letting of contracts for street improvements to be advertised is to secure fair competition and to enable the governing board to let the contracts upon the most advantageous terms. The advertisement is not to give notice to the property holders, nor does the letting of the contract adjudicate upon or determine in any degree their personal or property rights. The matter of accepting or rejecting bids, and of letting the contract, is purely administrative in character, depending entirely upon the discretion of the governing board.² It follows that such a governing board, which has rejected all bids received in pursuance of due notice of the letting of a contract for a street improvement, may, at a subsequent meeting, without a re-advertising for bids, reconsider the vote of rejection and award the contract to one of the original bidders.³

¹ *Rens v. City of Grand Rapids* (Mich., 1889), 41 N. W. Rep. 263.

² *Platter v. Board &c.*, 103 Ind. 360.

³ *Ross v. Stackhouse* (1887), 114 Ind. 200. The Indiana statute which provides that "whenever a majority of all the resident owners of any lots or parcels of land on any street or alley, not less than one square (to be estimated by numbers or by measuring the front lines of such lots or parcels of land bordering thereon), shall petition the board of trustees of such town to grade, pave, gravel or macadamize, or for either kind of said improvement, the board of trustees may cause the same to be done according to the specifications by them to be adopted, by contract given to the best bidder, after advertising to

receive proposals therefor," etc., has been held to fully authorize an ordinance for the improvement of a street to its full width, both sidewalks and roadway. *Wiles v. Hoss* (1887), 114 Ind. 371; s. c., 16 N. E. Rep. 800; for, said the court:—"The term 'street' in its ordinary acceptation includes sidewalks, and that it is always given that meaning unless the language with which it is associated changes or restricts its significance. *State v. Berdette*, 78 Ind. 185; s. c., 38 Am. Rep. 113; *City of Kokomo v. Mahan*, 100 Ind. 242; *Dooley v. Town of Sullivan*, 112 Ind. 454." In *Wiles v. Hoss*, *supra*, the court therefore held that a petition of the property owners for the improvement of "Hope street, between Willow and Schofield streets,"

§ 1104. **The same subject continued.**—A written proposal by the town authorities of the work to be done, a written bid to do the proposed work, and a written acceptance of the bid by the proper authorities, under the Indiana statute, together constitute a contract, wholly in writing, and valid and binding on the contractor and the town.¹

§ 1105. **Assignment of contract.**—The effect of assignment of contracts made with municipal authorities for public improvements as far as the liability of municipalities is concerned has received very full consideration from the Supreme Court of the United States. One who had made a contract with the board of commissioners of a county for the construction of a county jail, the same having been let to him as the

authorized an ordinance for the improvement of "that portion of Hope street and sidewalks thereof lying between Schofield and Willow streets."

¹ It was urged here that there was no proper advertisement for bids for the improvement of the street. Inasmuch as the statute of Indiana provides that in suits like this, to enforce assessments, "no question of fact shall be tried which may arise prior to the making of the contract for said improvement under the order of the board of trustees," the court held that the Supreme Court would not be authorized to reverse the court below on the ground that the evidence failed to show a "proper advertisement for bids." *Wiles v. Hoss* (1887), 114 Ind. 371; s. c., 16 N. E. Rep. 800. See, also, *Clements v. Lee* (1887), 114 Ind. 397, where this court said:—"A person about to enter into a contract with a city council must examine the records so far as to see that the common council has taken, or attempted to take, the steps necessary to acquire jurisdiction to enter into a contract. If the record fails to show that such steps were taken, a contractor or one about to contract has no right to rely

upon it. Where it appears, however, that an attempt was made to take the jurisdictional steps, such as the giving of any sort of notice, the sufficiency of the notice cannot be inquired into after the work has been done, with the acquiescence of the parties benefited, under color of the proceedings." *Taber v. Ferguson*, 109 Ind. 227; *Ross v. Stackhouse*, 114 Ind. 200, which qualifies the rule somewhat, as follows:—"While it is true that the statute prohibits the trial of any question of fact which arose prior to the making of the contract for a street improvement, it is nevertheless essential that the transcript must show the taking of such jurisdictional steps as legally authorized the common council to contract for the improvement. It must appear that the letting of the contract was advertised. In the absence of notice inviting proposals for the work the contract will be invalid. *Moore v. Cline*, 61 Ind. 113; *Overshiner v. Jones*, 66 Ind. 452; *Yeakel v. City of La Fayette*, 48 Ind. 116; *Baker v. Tobin*, 40 Ind. 310; *Moberry v. City of Jeffersonville*, 38 Ind. 198; *City of Indianapolis v. Imberry*, 17 Ind. 175; *Anthony v. Williams*, 47 Ind. 565.

lowest bidder in terms of the Indiana statutes and who had executed his bond to complete the work in the time fixed, and which provided for a forfeiture of a fixed sum for each day that the completion was delayed beyond that time, assigned to a company the contract so far as it involved his work in the construction of the building. Between the contractor and his assignee a sum was fixed for this work as though it had been let for it, and the assignment purported to give him the contractor's right for collection for certain iron work that he had from the county authorities. The assignee completed the iron work, though there was some delay as to time. The assignee brought action for the recovery of what it claimed to be due and upon the assignment of the contract. The case was removed to the United States court from the State court. The county authorities resisted the payment of the whole amount, as they had made a complete settlement with the contractor, and it only left a certain amount in their hands for this work—less than the amount claimed. The statute of Indiana forbids county commissioners to contract for the construction of any building the cost of which exceeds \$500, except after public advertisement for bids and with the lowest responsible bidder, after taking from him a bond with sureties to perform the work according to the contract, and to pay all debts incurred by him in its prosecution, including those for labor and materials, upon which bond any laborer or material-man having a claim against the contractor may sue. The court held that the assignment, unless assented to by the county, would not render it liable to the assignee for the amount to be received under it by the latter, nor prevent the county from making a settlement in good faith with the original contractor without retaining enough to pay the claim of the assignee.¹

§ 1106. The same subject continued.—The ruling in the case stated in the preceding section was put upon various grounds sustained by various decisions—some of which we will give. When rights arising out of contract are coupled with obligations to be performed by the contractor, and in-

¹ Delaware County Court v. Diebold Safe & Lock Co. (1889), 133 U. S. 473; S. C., 10 S. Ct. Rep. 339.

volve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract.¹ The court relied also upon the construction of the statute for letting contracts and the holdings by the Indiana Supreme Court; for instance, that the only remedy of laborers and material-men under that statute is against the contractor or upon his bond, and that they have no lien upon the building or action against the county; as well as that a county cannot be charged by process in the nature of garnishment or foreign attachment for the debts of its creditors to third persons; the reason assigned in each class of cases being that it would be contrary to public policy that a county should be involved in controversies and litigations between its contractors and their creditors.²

§ 1107. Assignment and subletting continued.—The Supreme Court of the United States through Justice Gray said:—"Those statutes [of Indiana] and the judicial exposition of them by the Supreme Court of the State, as well as the terms of the contract itself, are quite inconsistent with the theory that the original contractors can at their pleasure and without the assent of the county commissioners split up the contract and assign it in parts so as to transfer to different persons or corporations the duty of furnishing different kinds of material and labor, and the right of recovering compensation for such material and labor from the county commissioners. Both the statutes and the contract contemplate that the county commissioners shall be liable only to the contractors for the whole work and not to any persons doing work or supplying materials under a subcontract with them."³ The court distinguished cases in other States in which municipal corporations have been held liable to an assignee of a contract upon notice of the assignment without proof of the consent, expressed or implied, as follows:—In some of them the assign-

¹ *Arkansas Smelting Co. v. Belden* Comm'rs, 100 Ind. 59; *Wallace v. Mining Co.*, 127 U. S. 379, 387, 388. *Lawyer*, 54 Ind. 501.

² *Parke Comm'rs v. O'Conner*, 36 Ind. 531; *Secrist v. Delaware* ³ *Delaware County Comm'rs v. Diebold Safe & Lock Co.* (1889), 133 U. S. 473; s. c., 10 S. Ct. Rep. 399.

ments were of the whole or part of money already due or to become due to the contractor; in other words, assignments of a fund and not of any obligation to perform work.¹ In others the assignments were of entire contracts for the labor of convicts, or for labor upon streets, which were held from the nature of the subject to imply no personal confidence in the contractor.² In a Pennsylvania case, there being no controversy as to the performance of the work or as to the amount to be paid, but only as to the person entitled to receive payment, the court treated the assignment of the contractor as one of money only, and held the assignee entitled to recover against the city.³ But the Supreme Court of the last-named State has twice taken the same view as the Indiana court, holding it to be against public policy to permit municipal corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by subcontracts between their contractors and third persons to which they have never assented.⁴

§ 1108. Effect of an assignment of a contract.—An agreement by which a surety for the faithful performance of a contract is to make advances to a contractor to enable him to carry on the work, a city improvement, and to retain the amount of such advances and compensation therefor out of money arising from warrants to be paid to the contractor on account of such work, which the surety had a warrant of attorney to collect, and who had filed the latter with the comptroller, without notice to the city of such an agreement, will not bind the corporation to which the contractor is indebted. Nor is the corporation, under such a state of facts, bound to notify the surety of the contractor's indebtedness to the corporation. Such an agreement is not, therefore, an assignment of the contract to the surety which would entitle him to re-

¹ Brackett v. Blake, 7 Met. 335; Louis v. Clements, 42 Mo. 69; Taylor Field v. New York, 6 N. Y. 179; Hall v. Palmer, 31 Cal. 241.

v. Buffalo, 1 Keyes, 193; Parker v. ³ Philadelphia v. Lockhardt, 73 Pa. Syracuse, 31 N. Y. 376; People v. St. 211, 216.

Comptroller, 77 N. Y. 45. ⁴ Philadelphia's Appeal, 86 Pa. St.

² Horner v. Wood, 23 N. Y. 350; 179, 182; Geist's Appeal, 104 Pa. St. Devlin v. New York, 63 N. Y. 8; 351, 354.

Ernst v. Kunkle, 5 Ohio St. 520; St.

cover from the corporation an amount which it had applied to the indebtedness of the contractor.¹ The only right which a surety under such a warrant of attorney and agreement acquires is a right to receive what the city really owes the contractor.²

§ 1109. When a contract is complete.—Where there is a proposal for bids to do the work on any public improvement ordered by a municipal council or board, the contract for the work is only completed by the acceptance by the board of the bid of the lowest bidder for doing the work, the making of a bond, usually with sureties, by the bidder, and the acceptance of such bond by the board. The evidence of such acceptance in the form of a resolution, order or ordinance must be upon the record of the board's proceedings, and must show that whatever may be required by the statutes as to the mode or number of votes of the board necessary to bind the municipality or corporation by the contract has been complied with.³

§ 1110. Letting contract after returning bids.—A city council may order a public improvement and advertise for bids, and if the council in accordance with a resolution defer-

¹ *Clement v. City of Philadelphia* (Pa. St., 1891), 20 Atl. Rep. 1000.

² *Clement v. City of Philadelphia* (Pa. St., 1891), 20 Atl. Rep. 1000. The Supreme Court distinguished *Philadelphia v. Lockhardt*, 73 Pa. St. 211, where the contractor had assigned all moneys due and to become due under his contract with the city to merchants, who, on the faith of the assignment, furnished lumber for the building, accepted orders from and acted as trustee for all the mechanics and material-men, and virtually assumed and discharged all the obligations of their assignor under the contract. The city, with full knowledge of those facts, and after repeated recognition of the right of the assignee to receive the moneys arising from the contract, paid a portion of them to the contractor, and at-

tempted to justify the payment on the ground that the assignment was invalid. In this contention it was defeated. There was no question of set-off involved in the suit, and no demand for more than the contractor could recover if the assignment had not been made.

³ *Sullivan v. City of Leadville* (1888), 11 Colo. 483; s. c., 18 Pac. Rep. 736, sustaining a verdict in favor of the city in an action for breach of contract on the ground that an order accepting a bid for street work was invalid, as the record failed to show the concurrence of a majority of the council or the call of yeas and nays on the same, as the statutes of Colorado require. See, also, *Town of Durango v. Pennington*, 8 Colo. 257-262; *Tracey v. People*, 6 Colo. 151.

ring the letting of a contract return the bids unopened to the bidders, it may afterwards let a contract for making such improvement without again declaring the improvement to be a public necessity.¹

§ 1111. **Reletting contract.**—The Supreme Court of California sustained a second contract by a board of supervisors of a city for grading a street with a contractor who had entered into his first contract for a lower sum per cubic yard, the board having published a second resolution of intention under the statute which provided for the publication of a notice of intention, in the form of a resolution, to make the proposed improvement, after receiving a sufficient petition therefor, and for a hearing upon the same at the instance of any person in interest who might feel himself aggrieved. It was urged that, while the first contract existed, the board had no power to enter into the second contract. The ruling of the court was based upon the ground that for some substantial defect or other in the contract itself, the board of supervisors may properly have deemed it necessary to renew the proceedings and obtain bids over again, and the court would presume that the board acted regularly in effecting the second

¹ *Davies v. City of Saginaw*, 87 Mich. 439; s. c., 49 N. W. Rep. 667. In *Ferdinand v. Mayor &c. of New York* (1891), 13 N. Y. Supl. 226, where a contract made with the city to regulate and grade a certain street, which authorized the city to declare the work abandoned if not satisfactory, and relet the contract, the contractor to pay any excess should the work be let at a greater expense, and to be paid the difference if the expense were less, had been declared abandoned; and after a lapse of six years the city had made a contract with another contractor for "regulating, grading, and setting curb and gutter stones, and flagging sidewalks" in the same street, at a price considerably less than that of the first contract, the general term of the Supreme Court overruled the excep-

tions of the assignee of the contract to a dismissal of an action which he brought for the difference in cost, on the ground that this was not such a reletting or continuance of the first contract as would give him a cause of action. In *McGovern v. Loden* (N. J. Eq., 1890), 20 Atl. Rep. 209, it was held that it is a breach of the contract where the contract for a pavement required a foundation of concrete to be laid, composed of "best hydraulic cement, . . . clean, sharp sand, and . . . clean, broken stone," not to measure more than two inches in their largest dimension, and the contractor in doing the work used refuse stone, from two to six inches in their largest dimension, over which was poured a mixture of cement admitted not to be the best brand.

contract, and that a valid and sufficient reason existed for such action.¹

§ 1112. Discretion of municipal authorities.—The council of a city vested with power to pass ordinances providing for the paving and repaving of its streets is the judge both of the necessity or expediency of making improvements, and of the manner in which the work shall be done, and its action in providing for repaving a street with a particular kind of material is not the subject of review by a court.² A city clothed with power to improve its streets cannot be enjoined from making such an improvement, by an abutting land-owner, upon the ground that the work is being defectively performed.³

¹ *Spaulding v. North San Francisco &c. Ass'n* (1890), 87 Cal. 40; s. c., 25 Pac. Rep. 249. After a contract for street work has been awarded, a city charter provided that within a certain time after the awarding of the contract the owners of three-fourths of the abutting lots where the work is to be done, or of the lots which are liable to be assessed for the work, or their agents, may elect to take the work, under a written contract, at the price at which the same may be awarded; and that the superintendent of streets shall in his official capacity make all written contracts, receive all bonds and do all other acts that pertain to the street department. Upon an application in such a case by lot-owners to the superintendent of streets, and his consideration of the application and a signing of the written contract with them to do the work, a contractor to whom such work had been awarded cannot in *mandamus* proceedings have the court review the decision of the superintendent of streets in such matter on the ground that there was not an application by the required proportion of the lot-owners to take the work. The decision of the superintendent of streets is final and con-

clusive, it being presumed that he discharged his duty and was satisfied that the requirement of the charter in that respect had been met. *Fairchild v. Wall* (Cal., 1892), 29 Pac. Rep. 60.

² *Alberger v. Mayor &c. of Baltimore* (1885), 64 Md. 1; s. c., 20 Atl. Rep. 988, in which case it was held that a city commissioner's advertisement for proposals to furnish materials in a lump for the improvements authorized by an ordinance for repaving a street with a particular kind of material, and for similar improvements authorized by other ordinances, instead of advertising separately for proposals to furnish only the materials required for that special work, was a proper one.

³ *Dever v. City of Junction City* (Kan., 1891), 25 Pac. Rep. 861. Nor (it was held) is such an abutting land-owner entitled to an injunction restraining the city from making such an improvement on the ground that the character of the work is such that it will necessitate a special tax against the abutting property owners to pay therefor, where the ordinance under which the improvement is being made, attached to his petition as a part thereof, does not

§ 1113. **Power to reject a contract.**—A charter provision which declares that “no contract shall be let or entered into for the construction of any public work, or for any work to be done, or for the purchase or furnishing supplies for said city not herein provided for, and no such public work, performance, purchasing or supplying shall be commenced until approved by the common council, and until the contract therefor has been duly approved and confirmed by the common council and a tax or assessment levied to defray the cost and expense of the same; and no such work, supplies and materials shall be paid for, or shall be contracted to be paid for, except out of the proceeds of the tax or assessment thus levied,” makes the approval of the council a necessary requisite to validity of a contract with the city for any of the purposes above named. It was urged in one case that the authority to reject all the proposals for public work by other provisions in a city’s charter was vested in the board of public works, and not in the common council; and that it was the policy of the statute to confer upon the board of public works everything in the nature of administration, and to confine the common council to its sphere of legislative action. To this Grant, J., for the Michigan Supreme Court, said:—“But the power of the common council goes further. No paving can take place unless the money for the same is appropriated by the council for that purpose, and no work can be done except under a contract approved by the same body. The power to approve would seem to necessarily imply the power to reject; and the only provision that appears to hamper the action of the common council in this matter is the provision [in another section of the charter] that the contract must be let to the lowest responsible bidder. In the absence of any fraud, or any violation of the law, in respect to the lowest responsible bidder, it seems clear to me that the common council have the right to reject a contract and to refuse to go on with the work. This practically is the rejection of all bids [which was allowed in the other provisions of the charter].”¹

provide for any special tax to pay for the improvement, and his petition does not allege that any such tax has been levied, nor any act done indicating that such a tax is about to be levied.

¹ Grant v. Common Council &c. of City of Detroit (Mich., 1892), 51 N. W.

§ 1114. **Repaving — Pennsylvania rule illustrated.**— “Macadamizing” as used in the statutes of Pennsylvania with “paving,” connected by “and” or “or” to designate the general character of street improvements, has been held to be a species of paving within the rule of that State, that, where streets have been once paved, they cannot be repaved at the expense of abutting owners.¹

§ 1115. **Title to street essential to jurisdiction.**— A city acquires no title to the bed of a street until it has been regularly condemned as a public highway and the amount of the damages awarded therefor to the owner has been paid or tendered by the city authorities. And until such title is acquired the city cannot lawfully enter upon the land and assess the adjoining owners for the expense of grading, paving and curbing the street.²

§ 1116. **Opening and improving streets in one proceeding.**— The work of widening, grading and opening a street

Rep. 997, denying a writ of *mandamus* to the common council and board of public works to enforce a contract for public work in which the relator was the lowest bidder, his bid accepted and contract made with him by the board of public works and the common council failed to approve.

¹ *City of Harrisburg v. Legelbaum* (Pa., 1892), 24 Atl. Rep. 1070, holding that abutting owners were not liable for the cost of repairing a street merely because the expense of the original paving, nearly sixty years before, had not been paid by the then owners, but by the public. As to what constitutes “paving,” see *Burnham v. Chicago*, 24 Ill. 496; *Huidekoper v. Meadville*, 83 Pa. St. 158; *Warren v. Henly*, 31 Iowa, 31; *Greenburg Borough v. Laird*, 138 Pa. St. 533; s. c., 21 Atl. Rep. 96.

² *Mayor &c. v. Hook* (1884), 62 Md. 371, in which the court held that assessments for such work as a proposed street, determined and imposed

in advance of the condemnation of the street, were illegal and void. and their collection should be perpetually enjoined. See, also, *State v. Graves*, 19 Md. 370; *Graff v. Mayor &c. of Baltimore*, 10 Md. 551; *Norris v. Mayor &c. of Baltimore*, 44 Md. 604; *Stewart v. Mayor &c. of Baltimore*, 7 Md. 515. A property owner who has at his own expense well and properly set curbstones in front of his property on the proper line, in accordance with the style in common use, cannot be assessed, while they are in good order and repair, for the expense of replacing them. *Wistar v. City of Philadelphia* (1886), 111 Pa. St. 604, in which the city sought to impose upon such an owner of abutting property the expense of a change of curbstones that they might be better adapted to the roadway as it had been repaired. Following *Philadelphia v. Wistar*, 92 Pa. St. 404, and *Wistar v. Philadelphia*, 80 Pa. St. 505.

may be treated as one general improvement, and may be authorized to be conducted as such.¹ And the same commissioners who make the assessment for benefits may also assess the compensation for land appropriated or injuriously affected, and embrace the result of each proceeding in their report. But the condemnation proceeding is nevertheless a distinct and separate matter, and subject to the same legal conditions and restraints as in other cases. And only such benefits can be considered and allowed therein as pertain to that branch of the improvement. For example, if the improvement embraces the widening of a street, as well as the grading and opening thereof, then the commissioners, in estimating the net damages to a lot from the appropriation of the strip taken therefrom for such improvement, cannot lawfully consider and offset proportionate benefits for grading and opening the entire street in front of the lot, but only the benefits to that portion of the lot not taken from that branch of the improvement, as, for example, its increased value from a frontage on a wider thoroughfare. In ascertaining the just compensation to which the owner may be entitled, special benefits are allowed, because the real issue is as to the amount of damage suffered. And so it may be found that the benefits equal or exceed the damage to a particular tract, in which case only the excess, if such there be, should be considered in the general or final assessment for benefits for the entire improvement. But if the damages in the condemnation proceedings exceed the benefits allowed therein, the land-owner cannot lawfully be compelled to offset the amount awarded therefor against the general assessment for benefits, for he is entitled to be paid therefor in money.²

§ 1117. Description of work in resolution.—Property owners cannot sustain an action to vacate an assessment for an improvement on the ground only that the common council adopted a resolution for paving a street forty-two feet wide, and directed the city engineer to advertise for bids, and the lowest bid being accepted by the council for paving forty-two feet, the engineer made a contract for paying thirty-seven

¹ Cook v. Slocum, 27 Minn. 511; s. c., 8 N. W. Rep. 755.

² McKusick v. City of Stillwater, 44 Minn. 372; s. c., 46 N. W. Rep. 769.

feet, omitting a space of five feet between the rails of a street-car track on the street, which it was the duty of the street-railroad company to keep in repair, the specifications for the paving not including the space between the rails, and the cost of that part of the paving not being included in the assessment. In addition to any such irregularity as this, they must show injury resulting to them on account of the irregularity.¹

§ 1118. Conclusiveness of assessor's action.—Should a charter of a city impose the duty, and confer the power, upon assessors, in matters of local public improvements, to determine the benefits to the citizen's property and assess accordingly, it is a matter entirely within their discretion, and conclusive upon the property owners, in so far that they cannot attack it collaterally,—as in an action to restrain the collection of the assessment on the ground of an over-assessment of the benefits upon a complainant's property, there being no claim that any land benefited was not assessed, nor that there was any fraud in making the assessment. But upon a state of facts to justify it, relief might be given upon a direct review by *certiorari* of the assessment.² Assessors in finally determining the amounts to be assessed for benefits may fix such amounts without regard to the value of the buildings, for the reason that the amount of benefits was not affected by the improvements upon the lots, without violating any principle.³

§ 1119. Assessments for paving streets and constructing sidewalks.—In a case in which the New Jersey Court of Errors and Appeals held a statute authorizing the expense of paving the road-bed of a city street to be assessed in the proportion of two-thirds on the property abutting on the

¹ *Voght v. City of Buffalo* (N. Y. App., 1892), 31 N. E. Rep. 340, holding, also, the fact that land on one side of a street is assessed for paving a little more in amount than that on the other side, because the last-mentioned side is incumbered by a street-car track, does not invalidate the assessment, as it is competent for the assessors thus to exercise their judgment as to the apportionment of the benefits.

² *Hoffeld v. City of Buffalo* (N. Y. App., 1892), 29 N. E. Rep. 747.

³ *Hoffeld v. City of Buffalo* (N. Y. App., 1892), 29 N. E. Rep. 747. *Cf.* *Kennedy v. City of Troy*, 77 N. Y. 493; *Clark v. Village of Dunkirk*, 12 Hun, 182; s. c., 75 N. Y. 612; *O'Reillev v. City of Kingston*, 114 N. Y. 439; s. c., 21 N. E. Rep. 1004. As to relief in equity, *Strusburgh v. Mayor*, 87 N. Y. 452.

street, and the remaining third on the public at large, to be unconstitutional, the court approved the rule that assessments for local improvements of this character may be made against the property peculiarly benefited, but such assessments must be made to the extent only of such peculiar benefits. A distinction was made, however, between improvements of that kind and the improvements of sidewalks, and the rule held not to apply to the latter. Chief Justice Beasley said:—"A sidewalk has always in the laws and usages of this State been regarded as an appendage to and a part of the premises to which it is attached, and is so essential to the beneficial use of such premises that its improvement may be regarded as a burden belonging to the ownership of the land and the order or requisition for such improvement as a police regulation. On this ground I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable."¹

§ 1120. When cost of repairing cannot be charged to abutters.—The charter of a city made the cost of the construction of its streets chargeable against abutting property holders, and the cost of repairing the streets was to be paid by the city. Such a charter does not authorize the city to charge the abutting owners of property who, when they were beyond the limits of the city, had constructed a street in front of their property, with the cost of repairing such streets, after they were embraced in its extended limits, on the theory that such repairs of those streets constituted a construction of the same.²

¹State v. Mayor &c. of Newark (1874), 37 N. J. Law, 415, 423. See also, Weller v. McCormick (1885), 47 N. J. Law, 397, 400; Paxson v. Sweet, 1 Green, 196; Kirkpatrick v. Comm'rs, 13 Vt. 310; Robins v. New Brunswick, 15 Vt. 116; Goddard, Petitioner, 16 Pick. 504; Lowell v. Hadley, 8 Met. 180; Franklin v. Mayberry, 6 Humph. 368; Washington v. Nashville, 1 Swan, 177; White v. Nashville, 2 Swan, 364; De Blois v. Barker, 4 R. I. 445; Cemetery Co. v. Buffalo, 46 N. Y. 503; Borough of Greensburg v.

Young, 53 Pa. St. 280; Lands v. Richmond, 31 Gratt. 571; s. c., 31 Am. Rep. 742; State v. City Council of Charleston, 12 Rich. 702; Bonsall v. Lebanon, 19 Ohio, 418; Hydes v. Joyes, 4 Bush, 464; Palmer v. Way, 6 Colo. 106; Hart v. Brooklyn, 36 Barb. 226; Woodbury v. Detroit, 8 Mich. 309; Macon v. Patty, 57 Miss. 378; s. c., 34 Am. Rep. 451.

²O'Meara v. Green (1884), 16 Mo. App. 118. The court, referring to the principle that the necessity of a public improvement within the

§ 1121. Power of assessment illustrated and limited.—Councils, under the Illinois city and village act, have sole power to determine what portion of the cost of local improvements shall be paid by the public, and their determination is conclusive.¹ A law is not unconstitutional which authorizes the application of assessments for benefits on residues of lots, thus reducing the awards for the parts taken in opening streets.² The power to assess city property for local improvements may be constitutionally delegated by the legislature to a board of assessors acting independently of the city council.³ Farm land in a rural district cannot in Pennsylvania be assessed under the "foot-front rule" for municipal improvements, and a statute directing such assessment has been held to be void.⁴ A city may be enjoined from collecting assessments for improving its market property at the expense of the adjoining property of individuals, as it cannot do so under its power over streets and alleys.⁵

§ 1122. The same subject continued.—The assessment of special benefits for the purpose of raising a fund to pay those who have been damaged by the opening, widening or vacation of streets is a species of taxation, and therefore within the power of the legislature.⁶ Such assessments of special benefits caused by vacation of a street may be made personal against

limits of the charter power of a city being a question upon which the judgment of the legislative department of the city was conclusive, as held in *Sheehan v. Martin*, 10 Mo. App. 285; *Kemper v. King*, 11 Mo. App. 116, 127; and *Young v. St. Louis*, 47 Mo. 492, said:—"But this principle does not extend so far as to allow the legislature of the city to violate the charter itself by charging the cost of street repairs upon adjacent property owners. The municipal assembly cannot, merely by calling the repairs of a street by the name of construction or improvement, make such repairs, construction or improvement, and so exonerate the city from paying for them, and cast the burden upon adjoining property owners."

¹ *Watson v. Chicago*, 115 Ill. 78.

² *Genet v. Brooklyn*, 99 N. Y. 296.

³ *Little Rock v. Board of Improvements*, 42 Ark. 152.

⁴ *Scranton v. Pennsylvania Coal Co.*, 105 Pa. St. 445. In *In re East Syracuse*, 20 Abb. N. C. 131, it was held to be within the discretion of village trustees to improve a public highway outside the corporate limits of the village, where it appeared that the highway led to a gravel-bed owned by the village, and that the work was done on the highway so as to enable the village authorities to draw larger loads of gravel and more of them in the same length of time.

⁵ *Fort Wayne v. Shoaff*, 106 Ind. 66.

⁶ *In re Vacation of Centre St.*, 115 Pa. St. 247; s. c., 8 Atl. Rep. 56.

the owner, and the fact that they are generally against the property specially benefited and not against the owner personally cannot affect the constitutionality of a statute authorizing them to be made against the owner.¹

§ 1123. Assessment of benefits and damages.—Where provision is made by law for a review of assessment proceedings, and a body appointed with the power to set the assessment aside or correct the error complained of, and the party wholly fails to appear before such body or take any steps to have such correction made, he is not in a position to appeal to the courts for redress in the absence of fraud or bad faith.²

§ 1124. Notice for bids.—That a resolution by a city council directing its clerk to give the requisite legal notice for bids for repairing a street, and of the day of meeting to take action thereon, does not fix the day of meeting, but allows the clerk to fix such day, will not invalidate an assessment for such improvement, the notice actually given being in accordance with the statute.³ Nor will such an assessment be held in-

¹ *In re Vacation of Centre St.*, 115 Pa. St. 247. General statutes of the State of Georgia conferring upon one of its cities the power of taxation, and of making by-laws, regulations and ordinances, have been held not to empower it, in the absence of express legislative authority, to make local assessments for improvements upon the property adjacent to the streets on which the improvements were made. *City Council of Augusta v. Murphey*, 79 Ga. 101; s. c., 3 S. E. Rep. 326. The provision in the Minnesota constitution empowering the legislature to authorize "municipal corporations" to levy assessments for local improvements without regard to a cash valuation of the property assessed has been held to authorize such legislation in respect to counties. *In re Dowlan*, 36 Minn. 430; s. c., 31 N. W. Rep. 517.

² *Brown v. City of Grand Rapids*,

81 Mich. 101; s. c., 47 N. W. Rep. 117; *Williams v. Saginaw*, 51 Mich. 120; *Comstock v. Grand Rapids*, 54 Mich. 641; *Lumber Co. v. Crystal Falls*, 60 Mich. 510. To justify an interference of a court, on *certiorari*, with the judgment of commissioners in assessment of benefits, on the ground that the assessment was in excess of the benefits conferred by an improvement, there must be cogent proofs of error on the part of the commissioners. To make an objection that the commissioners did not take into consideration the benefits to other lots than those of remonstrants, the latter must show that the error has, or at least may have, injured them, by imposing upon their lands more than a proper assessment. *Righter v. Newark*, 45 N. J. Law, 104.

³ *Gilmore v. City of Utica* (N. Y. App., 1892), 29 N. E. Rep. 841, affirming 15 N. Y. Supl. 274.

valid, where the common council is authorized to accept the bid for the public improvement which is deemed most favorable, because a lower bid than the one accepted was received, in the absence of any abuse of its power by the council.¹

§ 1125. Collateral attack of assessments.— It is a settled rule that statutes granting to municipal corporations power which involves the imposition of burdens upon private property are to be strictly construed; and where such statutes require the doing of some particular thing in its nature jurisdictional as a condition precedent to the right to impose such burden, the failure to do the thing required will render the whole proceeding void.² It seems generally held, however, that in matters of local improvements, where jurisdiction over the whole subject is conferred upon a municipal corporation, with power to make local assessments for that purpose, any failure to comply strictly with any statutory requirement not affecting the jurisdiction will be regarded a mere irregularity, and in a collateral proceeding will be disregarded.³

* *Gilmore v. City of Utica* (N. Y. App., 1892), 29 N. E. Rep. 841, affirming 15 N. Y. Supl. 274. And in an action to vacate a street assessment, the fact that plans for the street improvement were in the alternative would be immaterial in the absence of proof that any one was misled or prevented from bidding, or that the cost of the work done was enhanced thereby. *Gilmore v. City of Utica, supra*.

² *Niklaus v. Conkling*, 118 Ind. 289; s. c., 20 N. E. Rep. 797; *Madison v. Smith*, 83 Ind. 502; *Wely on Assessments*, § 319; *Supervisors v. United States*, 4 Wall. 435; *Mason v. Fearson*, 9 How. 248; *Wheeler v. City of Chicago*, 57 Ill. 415; *Merritt v. Village of Port Chester*, 71 N. Y. 309; *Myrick v. City of La Crosse*, 17 Wis. 442; *Case v. Johnson*, 91 Ind. 477; *City of Logansport v. Dykeman*, 116 Ind. 15; s. c., 17 N. E. Rep. 587; *Hoyt v. City of East Saginaw*, 19 Mich. 39.

³ *Jackson v. Smith*, 120 Ind. 520; s. c., 22 N. E. Rep. 431; *Montgomery v. Wasem*, 116 Ind. 343; s. c., 15 N. E. Rep. 795; 19 N. E. Rep. 184; *Ross v. Stackhouse*, 114 Ind. 200; s. c., 16 N. E. Rep. 501; *City of Elkhart v. Wickwire*, 121 Ind. 331; s. c., 22 N. E. Rep. 344; *Smith v. Engle*, 44 Iowa, 265. As, for instance, if the statute requires the filing of a petition as a condition precedent to the exercise of jurisdiction, or the giving of some particular notice, if a petition was filed, though defective, or some notice was given, though not a compliance with the statutory requirement, the proceeding is not void and will be sufficient to withstand a collateral attack. *Johnson v. State*, 116 Ind. 374; s. c., 19 N. E. Rep. 298; *Hobbs v. Board &c.*, 116 Ind. 376; s. c., 19 N. E. Rep. 186; *Otis v. De Boer*, 116 Ind. 531; s. c., 19 N. E. Rep. 141; *Prezinger v. Harness*, 114 Ind. 491; s. c., 16 N. E. Rep. 495; *Robinson v. Rippey*, 111

§ 1126. **Decisions as to property benefited.**—In ordering public improvements of a kind which are to be paid for by an assessment upon the property of the persons benefited thereby the decision of a board of public works or other corporate authority, as to what property is benefited and to what extent, by the improvement, is conclusive and cannot be reviewed, unless shown to be fraudulent in fact or unless it is made upon a demonstrable mistake of fact.¹ It has been suggested in another case that if the board acted upon an illegal principle of assessment it would vitiate the assessment.² Where, however, an objection to an assessment for an improvement is that it was made under a mistake of fact, and it is not charged that there was any fraud or application of an illegal principle of assessment, the objection to prevail must show a mistake of fact.³ A suit by property owners to set aside an assessment made for improvement and restrain its collection is not maintainable against the consent of the city, as these owners may, upon the application of the city for judgment upon the assessment warrant, present and have determined any objection to the assessment going to its validity.⁴ But such a suit may be maintained and the validity of the assessment determined and the proper relief granted, if the city do not object to the matter being presented to the court in that manner instead of in the manner provided in its charter.⁵ Where by the provisions of the charter of a city a full opportunity is given to property owners to be heard upon the pro-

Ind. 112; s. c., 12 N. E. Rep. 141; *Strieb v. Cox*, 111 Ind. 299; s. c., 12 N. E. Rep. 481; *Pickering v. State*, 106 Ind. 228; s. c., 6 N. E. Rep. 611; *Argo v. Barthand*, 80 Ind. 63; *Ricketts v. Spraker*, 77 Ind. 371.

¹ *State v. Board*, 27 Minn. 442; s. c., 8 N. W. Rep. 161. See, also, *Dousman v. St. Paul*, 22 Minn. 387, refusing a writ of *certiorari* to bring to the Supreme Court for review the proceedings of the council and board, for the reason that the assessment for improvements cannot be enforced without giving the property owner full and adequate opportunity to defend.

² *State v. District Court*, 33 Minn. 164; s. c., 22 N. W. Rep. 295.

³ *State v. District Court of Ramsey County* (Minn., 1891), 50 N. W. Rep. 476.

⁴ *Albrecht v. City of St. Paul*, 47 Minn. 531; s. c., 50 N. W. Rep. 608, overruling *Mayall v. City of St. Paul*, 30 Minn. 294; s. c., 15 N. W. Rep. 170.

⁵ *Albrecht v. City of St. Paul*, 47 Minn. 531; s. c., 50 N. W. Rep. 607. Cf. as to actions for injunction being sustained, *Oil Co. v. Palmer*, 20 Minn. 468; *Sewell v. City of St. Paul*, 20 Minn. 511.

priety of an assessment for improvements, they cannot complain, where an assessment has been wholly set aside and a new one ordered by the governing authority, that the notice of the original assessment was not properly given. Such an irregularity would be cured by the proceedings relating to the new assessment.¹ And where a council appropriates for an improvement — as for a sewer — a sum over and above the amount appropriated for that purpose by the appropriation bill of the preceding year, and the same is made a special assessment against certain property, but afterwards a new assessment is ordered and the excess is taken off of that property and appropriated from the general fund, the owners of such property should not be heard to complain that such appropriation was not submitted to the electors of the city.²

§ 1127. **Liabilities and rights of abutters.**— There cannot be a paving assessment under the Iowa statute on abutters, when the only work done in grading is grading preparatory merely to paving.³ A statute conferring the right to prevent a proposed improvement upon the owners of the majority of the frontage thereon, if their land is liable to be assessed therefor, the owner of land assessed, but not fronting the proposed street, or legally exempt from assessment, cannot competently object.⁴ The exercise of the power conferred upon a town by the Indiana statute to narrow streets does not unconstitutionally deprive an abutter of his property without his consent and without compensation, the use being a public use, although, incidentally, it results in that part of the street cut off going into private hands.⁵ If the grade and width of a street have been officially established it may be ordered planked, although it has not been graded.⁶ One sustaining special damage, in Illinois, from a public improvement, for instance, a viaduct, is entitled to compensation based on the depreciation of the market value of his property.⁷ A city is liable for damages

¹ *Townsend v. City of Manistee*, 88 Mich. 408; s. c., 50 N. W. Rep. 321, involving an assessment for construction of a sewer.

² *Townsend v. City of Manistee*, 88 Mich. 408; s. c., 50 N. W. Rep. 321.

³ *Beecroft v. Council Bluffs*, 63 Iowa, 646.

⁴ *State v. Township of East Orange* (N. J.), 8 Atl. Rep. 107.

⁵ *Rensselaer v. Leopold*, 106 Ind. 29.

⁶ *Knowles v. Seale*, 64 Cal. 377.

⁷ *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415.

caused by raising the grade of the streets to an owner of houses erected before the grade was established.¹ A statute providing for compensation where the grade of a street is changed should be construed to embrace a sidewalk as well as a street.²

§ 1128. Damages for change of grade.—Damages having once been assessed and paid to a property owner for injury to his property resulting by a change of grade in a street, the corporation would not be liable to him because the change proves to have cut off all access to his lot, as it must be presumed that the injury was covered by the damages awarded.³ A city has been held liable for damages to a lot-owner by reason of access being cut off to his land by the city's construction of a viaduct over a railway track. It was urged by the city that the lot-owner had granted to the railroad a part of the land for the erection of an embankment to support the track in such a manner as to render the viaduct indispensable. This purpose of the grant was denied, as also that it was for any specified purpose, and it was replied also that the lot-owner had no knowledge then or afterwards that a viaduct was proposed; nor did his deed assume to convey any interest in the street, but described the property so as to include that only which lay outside the street. The viaduct was considered an improvement entirely distinct from the railroad, and therefore the damages resulting therefrom were not included in the grant.⁴ Where the evidence is undisputed that a remonstrant would sustain substantial damages by the vacation of a highway, he is entitled to damages.⁵

§ 1129. Action by abutter to enjoin completion of a contract.—The owner of abutting property upon a street undergoing improvement by a city who is to be assessed for benefits accruing to his property by reason of such improvements has the right to apply to a court of equity for an in-

¹ *Harmon v. Omaha*, 17 Neb. 548; 52 Am. Rep. 420.

² *Kokomo v. Mahon*, 100 Ind. 242.

³ *Keil v. City of St. Paul (Minn.)*, 50 N. W. Rep. 83.

⁴ *Tinker v. City of Rockford (Ill.)*, 28 N. E. Rep. 573, reversing 36 Ill. App. 460.

⁵ *Cook v. Quick (Ind.)*, 26 N. E. Rep. 1007.

junction to restrain a contractor from completing the work, on the ground that the contractor has been guilty of a breach of his contract in the manner of doing the work or in the quality of material he has used in doing it. Though such an action may be brought in the name of the attorney-general, on relation, it may properly be brought in the name of the property owner.¹ Where his bill alleges that the work is being so imperfectly done as to require constant repairs at great cost and expense, it is not necessary to allege that complainant is liable for assessments for benefits from the improvement.² Nor is it necessary in such a bill to allege fraud and collusion between the contractor and the city officials charged with the duty of seeing that the contract is performed.³ It was urged that the complainant's bill in the case should be dismissed because he had not notified the council of the breach of contract, requested them to move to restrain the completion of the work, and been met by a refusal on their part to act in the matter, according to the rule laid down by the authorities cited in the note.⁴ The chancellor held that the action of the street commissioner in examining

¹ *McGovern v. Loder* (N. J. Eq., 1890), 20 Atl. Rep. 209 (involving a paving contract); *Bond v. Newark*, 19 N. J. Eq. 376; *Schuman v. Seymour*, 24 N. J. Eq. 144-156; *Liebstein v. Newark*, 24 N. J. Eq. 202.

² *McGovern v. Loder* (N. J. Eq., 1890), *supra*. The chancellor said:—"It need not be discussed whether or not an abutter should stand by and see a proposed public improvement of this kind carried on to completion under a contract which is being violated at every step, before he has any right to complain or protest, because it may appear ultimately that he will receive no benefit from such improvement; for, in this case, besides the right of every tax-payer to see to it that all public moneys are expended for the public welfare, and according to the strict letter of the contract or the law under which they are expended, the bill alleges

that this pavement, if it be permitted to be laid in the manner approved by the street commission, will be so imperfectly laid as soon to give way, and need constant repair at great cost and expense. It is evident that if this allegation be sustained the complainant has a right to protect himself against the burden which will thereby fall upon him through such illegal performance of the contract in question."

³ *McGovern v. Loder, supra*.

⁴ *Dillon on Munic. Corp.*, § 915; *Dodge v. Woolsey*, 18 Hun, 343, 344; *Howes v. Oakland*, 104 U. S. 450; *Huntington v. Palmer*, 104 U. S. 482; *Greenwood v. Freight Co.*, 105 U. S. 13; *Detroit v. Dean*, 106 U. S. 537, 542; s. c., 1 S. Ct. Rep. 560; *Dimpfel v. Railroad Co.*, 110 U. S. 209; s. c., 3 S. Ct. Rep. 573; *Quincy v. Steel*, 120 U. S. 241; s. c., 7 S. Ct. Rep. 520.

the work and approving the same took this case out of the rule established in those cases.¹

§ 1130. **Actions to vacate assessments.**—An action in equity to vacate an assessment and restrain its collection cannot be maintained merely because the assessment is for any reason invalid or illegal.² The foundation of this rule is principally in public policy. It would lead to great embarrassment and inconvenience if the collection of taxes and assessments were to be delayed by such actions.³ The reason why an action at law cannot be maintained for the recovery of money paid upon an illegal assessment, not void upon its face so long as the assessment remains unvacated and unreversed, is because the action of the assessors is regarded as judicial, and because the assessment is regarded as in the nature of a judgment which cannot be attacked collaterally. The money paid upon the assessment in such a case is treated as if collected by virtue of a valid judgment, which can be retained until the judgment is vacated or reversed.⁴ An action can be maintained to vacate an assessment which is a lien upon land, and thus a cloud upon title, when the assessment is in fact invalid and the invalidity does not appear upon the face of the assessment, and will not necessarily appear in any proceeding taken by a purchaser to recover possession of the land. This is so because in such a case the action comes under one of the recognized heads of equity jurisprudence.⁵

¹ *McGovern v. Loder* (N. J. Eq. 1890), 20 Atl. Rep. 209. The chancellor said:—"This decision of the street commission having been made known, it was the duty of those who felt themselves aggrieved to act promptly."

² *Heywood v. City of Buffalo*, 14 N. Y. 534; *Guest v. City of Brooklyn*, 69 N. Y. 506.

³ *Strusburgh v. Mayor &c. of New York* (1882), 87 N. Y. 452.

⁴ *Strusburgh v. Mayor &c. of New York* (1882), 87 N. Y. 452.

⁵ *Diefenthaler v. The Mayor &c.* (1888), 111 N. Y. 331, approving and following *Strusburgh v. Mayor &c.*

of New York (1882), 87 N. Y. 452, in which the plaintiff's action in equity, the relief prayed for being for a judgment declaring the assessment invalid to the extent of an overpayment claimed by the plaintiff, and then to recover the amount of such overpayment, was held to have been properly brought and maintainable. Earl, J., said:—"Here is a case where it is conceded that the plaintiff is equitably and justly entitled to the sum which he seeks to recover. The only obstacle in his way is the unvacated assessment. That obstacle, without any fault of his, he is unable to overcome or remove in an action

§ 1131. **Action to restrain collection of assessments.**— In an action by a property owner whose property has been assessed for improvements in its front, to set aside such assessment and restrain its collection, it is not sufficient for the complaint to allege in direct terms the inequality and injustice of such assessment; it must also allege facts showing such inequality and injustice, or going to the groundwork of the assessment.¹ Such a complaint alleging facts showing mere irregularities and failures to comply with some minor statutory requirements will be held insufficient unless it further alleges an offer to pay the amount of such assessments justly chargeable to the property of the complainant.²

§ 1132. **The same subject continued.**— In an action to restrain the sale of land for non-payment of an assessment for a local improvement, and to set aside the assessment because of alleged invalidity in the proceedings, the burden is upon plaintiff to establish the invalidity complained of, there being no presumption in such an action that municipal authorities have acted illegally or that conditions precedent have not been performed.³ Where a charter of a village requires the petition

or proceeding at law. No degree of vigilance which could have been expected or required of him would have enabled him before payment to discover the illegality in the assessment. Unless, then, he can have equitable relief there will be a wrong without a remedy — an absolute failure of justice. Upon general principles of equity, then, we think he should have the equitable relief he seeks against the obstacle interposed in aid of the legal relief which he demands." Again he said:—"It will not be against public policy to allow an action under the circumstances of this case to be maintained. The assessments have been collected and the revenue for public purposes has been realized. It will be no more embarrassing for a municipality to be compelled to pay this debt than to be compelled to pay a debt of any

other kind. Under such circumstances there can be no public policy which will be served or promoted by depriving a citizen of the money justly due him and leaving it where it has been placed by the illegal action of a municipality or its officers."

¹ *Meggett v. City of Eau Claire* (Wis., 1892), 51 N. W. Rep. 566; *Pratt v. Lincoln County*, 61 Wis. 62; s. c., 20 N. W. Rep. 726; *Fisfield v. Marinette County*, 62 Wis. 532; s. c., 22 N. W. Rep. 705; *Wisconsin Central R. Co. v. Ashland County* (Wis.), 50 N. W. Rep. 939, 940.

² *Meggett v. City of Eau Claire* (Wis., 1892), 51 N. W. Rep. 566.

³ *Tingue v. Village of Portchester* (1886), 101 N. Y. 294. See 1 *Greenleaf on Evidence*, § 74; *Bontong v. City of Brooklyn*, 15 Barb. 375, 395; *In re Ingraham*, 64 N. Y. 310; *Heinemann v. Heard*, 62 N. Y. 448.

for laying out a street to be signed by persons owning land on the line thereof, but does not require the fact of such ownership to be stated in the petition, the fact that the petition for opening a street does not show on its face that the persons signing it are owners does not tend to negative their ownership; and in an action of this kind the invalidity of the proceedings in that respect could not be established.¹ And a plaintiff in such an action is foreclosed by an order of confirmation of a report of commissioners on the matter of an improvement from objections which might have been corrected on appeal from such a report.² Besides, where parties interested in the lands taken for the street, and especially those under whom such a plaintiff claims, who were then owners of the land, had acquiesced in the proceeding and accepted awards made to them, the plaintiff would be concluded from alleging irregularities in such proceeding.³ And the fact that the specifications upon which the bids for grading were based embraced another street as well as the one in question would be immaterial where it appears that profile maps showing the amount and kind of excavation and filling required on each street were separately made and filed with the specifications.⁴

§ 1133. Actions to recover money paid upon illegal assessments.—If money is compulsorily obtained by a municipal corporation on an assessment void on the face of the record for lack of jurisdiction of the person or property, or by reason of the unconstitutionality of the statute under which the assessment is made, it may be recovered from the municipality in an action at law brought by the wronged tax-payer. But in case money is collected under an assessment illegal, as, for instance, by reason of the existence of some fact outside of the record, it cannot be recovered until the assessment is set aside.⁵ And where one person assessed has brought an action

¹ *Tingue v. Village of Portchester*, 101 N. Y. 294.

² *Tingue v. Village of Portchester*, *supra*.

³ *Tingue v. Village of Portchester*, *supra*.

⁴ *Tingue v. Village of Portchester*, *supra*.

⁵ *Trimmer v. City of Rochester* (1892), 130 N. Y. 401; *Horn v. Town of New Lots*, 83 N. Y. 101; *Pursell v. Mayor &c.*, 85 N. Y. 330; *Strusburgh v. Mayor &c.*, 87 N. Y. 452; *Bruecher v. Village of Portchester*, 101 N. Y. 240; *Jex v. Mayor &c.*, 103 N. Y. 536; *Swift v. City of Poughkeepsie*, 37 N.

to set aside an assessment and had judgment in his case, the assessment against others would not be affected or invalidated by such judgment. Each one will be obliged to have it set aside as against his property before he can maintain an action to recover the sums paid under it.¹

§ 1134. **Power to assess abutting owner.**—The universal holding is that a street is for the public use, and its improvement is for a public purpose; and a municipality may tax abutting lands for the improvement of a portion of a street. In this respect the municipality has great discretion, but it may abuse that discretion so that the courts would be justified in interfering to prevent gross injustice.² While a municipality cannot tax a single man for his own benefit alone, it can tax a group of citizens for their joint benefit.³

§ 1135. **The same subject continued.**—Where a city, in exercising its authority to improve streets, is required, on petition of a majority of the property owners affected, to designate by ordinance the section of a street to be improved, and a section is designated and the contract let, the city cannot thereafter improve only a part of the section designated, and collect the cost therefor from the proprietors abutting on the part so improved; a tax-bill in such a case is not legally

Y. 511; *Bank of Commonwealth v. The Mayor*, 43 N. Y. 184; *Marsh v. City of Brooklyn*, 59 N. Y. 280; *Peyser v. The Mayor*, 79 N. Y. 621.

¹*Trimmer v. City of Rochester* (1892), 130 N. Y. 401; *Matter of Delancey*, 52 N. Y. 80; *Wilkes v. Mayor*, 79 N. Y. 621; *Purcell v. Mayor &c.*, 85 N. Y. 330; *Chase v. Chase*, 95 N. Y. 373. In *Moore v. City of Albany*, 98 N. Y. 396, it was held that in case all the assessments on the roll were illegal for a common cause, not appearing on the face of the roll, or on the record on which it rested, a judgment vacating an assessment in favor of one tax-payer did not vacate the assessments against the others. *Reid v. Board of Supervisors of Albany County*, 128 N. Y. 364.

²*City of Independence v. Gates* (Mo., 1892), 19 S. W. Rep. 728. See, also, *Paulson v. Portland*, 16 Oregon, 450; S. C., 19 Pac. Rep. 450; *Little Rock v. Katzenstein* (Ark.), 12 S. W. Rep. 198; *Pueblo v. Robinson* (Colo.), 21 Pac. Rep. 899.

³*Levee Co. v. Hardin*, 27 Mo. 496; *Palmyra v. Morton*, 25 Mo. 593; *Sheehan v. Hospital*, 50 Mo. 155; *St. Louis v. Allen*, 53 Mo. 44; *Kent v. Bingham*, 100 Mo. 300; S. C., 13 S. W. Rep. 683, which cases settle that the power of municipalities to assess for benefits is referable to the taxing power, though such assessments are not "taxes" in the sense that word is usually employed.

issuable until the entire work is completed in accordance with the contract, and as designated by the ordinance.¹ The cost of improvement should be apportioned among the abutting property owners throughout the entire district designated by the ordinance for improvement, on the principle that all the property in the designated district must be taxed.² The constitutional provisions as to uniformity of taxation and the like are only applicable to taxation in the ordinary acceptance of the term, and are wholly inapplicable to mere local assessments for public improvements.³

§ 1136. The same subject continued — Homestead subject to sale.— The rule is well settled in Texas that local assessments for pavements or sidewalks, or other improvements of a similar character, when imposed and levied by a city according to law upon the abutting property, are special taxes, for which the homestead may be sold, as other lands, in the mode which may be provided by law. The homestead may be subjected to forced sale, under the constitution, for taxes due thereon; and these local assessments, if regularly levied, will create a lien upon even the homestead, of which the district court, under the constitution, has ample jurisdiction, and may foreclose the same.⁴ And where the owners of a homestead are duly notified of the foreclosure proceedings in such a case of lien, a judgment of the district court foreclosing the lien is conclusive as against a collateral attack in trespass to try title by the purchaser at such foreclosure sale against the original owners, even though such judgment be based on erroneous conclusions of law and entered by default.⁵

¹ *City of Independence v. Gates* 390; *Lockwood v. St. Louis*, 24 Mo. (Mo., 1892), 19 S. W. Rep. 728.

² *City of Independence v. Gates* 495; *Garrett v. City of St. Louis*, 25 (Mo., 1892), 19 S. W. Rep. 728. See, Mo. 505.

also, *Diggins v. Brown*, 76 Cal. 318; ⁴ *Bordages v. Higgins* (Tex., 1892), s. c., 18 Pac. Rep. 373; *Rentz v.* 19 S. W. Rep. 446. See, also, *Lufkin v. Galveston*, 58 Tex. 549; *Wood v. Galveston*, 76 Tex. 126; s. c., 13 S. W. Rep. 227; *Adams v. Fisher*, 68 Tex. 654; 75 Tex. 657; s. c., 6 S. W. Rep. 772; *Allen v. Galveston*, 51 Tex. 302; *Roundtree v. Galveston*, 42 Tex. 613.

³ *City of St. Joseph v. Owen* (Mo., 1892), 19 S. W. Rep. 713; *Sheehan v. Samaritan's Hospital*, 50 Mo. 155; ⁵ *Bordages v. Higgins* (Tex., 1892), *Fairar v. City of St. Louis*, 80 Mo. 19 S. W. Rep. 446.

§ 1137. **Instances of tax-bills adjudged invalid.**—The power to improve streets is an extraordinary one, and is often liable to abuse, and hence the courts have held those who exercise it to a strict compliance with the terms of the grant.¹

§ 1138. **Liability of the corporation for negligence.**—The Supreme Court of the District of Columbia have declared the principle to be as follows:—“A mere error of judgment in the construction of such work does not seem, on the authorities, to be a ground of action in the absence of carelessness in the selection of a plan or the employment of proper agents to devise and execute it.”² It is therefore competent, in an action for damages resulting from the construction of a public work against a municipal corporation, for the corporation to show that its governing authorities exercised care in the selection of engineers of capacity and skill to make the plans for the work and capable persons to superintend the work to relieve the corporation from liability.³ A municipal corporation, in discharging the duties imposed upon it by statute, in the matter of public improvements, as in caring for its highways, as long as its acts are kept within the authority of the statute, is not liable for damages to individual property and no wanton or unnecessary damage is done, and it is not

¹ *Cole v. Skrainka* (1891), 105 Mo. 303; s. c., 16 S. W. Rep. 491, in which it is held that it must appear that there has been a fair compliance with all the conditions precedent, whether prescribed by charter or ordinance, to entitle a city or contractor to recover from the abutting property holder the expenses of paving a street or other local assessment; and, in the absence of such showing, the tax-bill would be void. 2 *Dillon on Munic. Corp.* (4th ed.), § 811. See, also, *Kiley v. Oppenheimer*, 55 Mo. 374, holding a recovery could not be had on a tax-bill where the city engineer had let the contract for work while the publication required by the statute was being made. *Leach v. Cargill*, 60 Mo. 316, where the tax-bill was held invalid because of the failure

to give the property owner an opportunity to do the work which the ordinance provided should be done. *City of St. Joseph v. Anthony*, 30 Mo. 538, a suit to collect the cost of macadamizing a street, holding that a substantial compliance with the laws must be shown, but that an observance of all the formalities prescribed by ordinance would not be required. *Sheehan v. Owen*, 82 Mo. 458.

² *Johnston v. District of Columbia*, 1 Mackey, 427.

³ *City of Terre Haute v. Hudnot* (1887), 112 Ind. 542; s. c., 13 N. E. Rep. 686. See, also, *Van Pelt v. City of Davenport*, 42 Iowa, 308; *Lehn v. City of San Francisco*, 66 Cal. 76; *Barnes v. District of Columbia*, 91 U. S. 540.

guilty of negligence in causing the damage.¹ The implied liability for damages in construction of a municipal improvement arises for all damages not necessarily incident to the work, and which are chargeable to the improper or unskilful manner of executing it.² When undertaking a public improvement a municipality is bound to exercise the same degree of care and prudence that a cautious individual would do if the whole loss or risk were his own; and it is liable, like an individual, for damages resulting from negligence or omission of duty.³

§ 1139. The same subject continued.—Where the plan of municipal work, as of gutters, drains and sewers especially, has been determined upon, the work of constructing them is ministerial and must be performed in a skilful, prudent and careful manner, so as not to injure private property; and a municipality is liable in a civil action for damages caused by the careless or unskilful manner of performing the work, or for a failure of its duty to keep the same in good condition and repair.⁴ In the construction of a public work which may have to resist sudden freshets, the degree of care or foresight which it is necessary to use must always be in proportion to

¹ *Bronson v. Borough of Wallingford* (1887), 54 Conn. 513; s. c., 9 Atl. Rep. 393; *Judge v. City of Meriden*, 33 Conn. 90.

² *City of Denver v. Rhodes* (1886), 9 Colo. 554; s. c., 13 Pac. Rep. 729; *Powers v. City of Council Bluffs*, 50 Iowa, 197.

³ *City of Denver v. Rhodes* (1886), 9 Colo. 554; s. c., 13 Pac. Rep. 729; *Shearman & Redfield on Negligence*, § 144; *Harper v. City of Milwaukee*, 20 Wis. 372; *Barton v. City of Syracuse*, 36 N. Y. 54.

⁴ *City of Logansport v. Wright*, 25 Ind. 512; *Mills v. City of Brooklyn*, 32 N. Y. 489; *McCarthy v. City of Syracuse*, 46 N. Y. 196; *Barton v. City of Syracuse*, 36 N. Y. 54; *Nims v. Mayor*, 59 N. Y. 508. In *Hitchins v. Mayor of Frostburg* (1887), 68 Md.

100; s. c., 11 Atl. Rep. 826, it was held that there is a municipal liability where the property of private persons is flooded by surface water, either directly or by the water being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts or sewers, or of the negligent failure to keep the same in repair and free from obstruction, and this whether the lots are below the grade of the streets or not. See, also, *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Barton v. City of Syracuse*, 36 N. Y. 54; *Rowe v. Portsmouth*, 56 N. H. 291; *City of Cumberland v. Wilson*, 50 Md. 138; *Kranz v. Baltimore City*, 64 Md. 491.

the injury likely to result from the events to be guarded against.¹

§ 1140. **Damage for improper construction.**— Out of the powers conferred upon municipal corporations with respect to streets, drains, sewers, etc., and the manner of their exercise, and the duties resulting therefrom, arises the liability for injuries resulting to property of citizens from defective construction or repairs of such public works, or improper grading or repairs of streets. Judge Cooley says: —“ The grant by the State to the municipality of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise on the part of the corporation to perform the corporate duties; and this implied contract made with the sovereign power inures to the benefit of every individual interested in its performance. In this respect these corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise on condition of the performance of certain public duties, are held to contract by the acceptance for the performance of these duties. In the case of public corporations, however, the liability is contingent on the law affording the means of performing the duty, which in some cases, by reason of restrictions upon the power of taxation, they might not possess. But assuming the corporation to be clothed with sufficient power by the charter to that end, the liability of a city or village vested with control of its streets for any neglect to keep them in repair, or for any improper construction, has been determined in many cases. And a similar liability would exist in other cases where the same reasons would be applicable.”² The same author in another place says: — “ In regard to all those powers which are conferred upon the corporation, not for the benefit of the *general* public, but of the corporators,—as to construct works to supply a city with water, or gas-works, or sewers, and the like,—the corporation is held to a still more strict liability, and is made to respond in dam-

¹ Mayor v. Bailey, 2 Denio, 440; City of Denver v. Capelli, 4 Colo. 29; Powers v. City of Council Bluffs, 50 Iowa, 197. ² Cooley on Const. Lim., p. 248. See, also, Baltimore City v. Marriott, 9 Md. 160; Taylor v. Cumberland, 64 Md. 68.

ages to the parties injured by the negligent manner in which the work is constructed or guarded," etc.¹

§ 1141. The same subject continued — Constitutional provisions.— The constitutional provision that "the property of no person shall be taken or damaged for public use without just compensation therefor" gives to an individual, whose property has been damaged by construction of a public improvement, a right of action, although the work has been carefully and skilfully performed.² And though no statute has been passed by the legislature prescribing the manner of enforcing such a constitutional provision, an abutting land-owner is entitled to his action for damages by a city to his property caused in changing the grade of a street in its front.³ A constitutional provision that "private property shall not be taken or damaged for public use without just compensation" is self-enforcing.⁴ Where a change of grade of a street, even though not sanctioned by an ordinance, has been recognized by the public and by the officers of the city, a city may be liable to one injured by the change of grade.⁵

¹ Cooley on Const. Lim., p. 249.

² *City of Plattsmouth v. Boeck* (Neb., 1891), 49 N. W. Rep. 295, following *Harmon v. Omaha*, 17 Neb. 548; s. c., 23 N. W. Rep. 503.

³ *Householder v. City of Kansas* (1884), 83 Mo. 488.

⁴ *Householder v. City of Kansas* (1884), 83 Mo. 488; *People v. McRoberts*, 62 Ill. 40; *Johnson v. City of Parkersburg*, 16 West Va. 402; *Blanchard v. City of Kansas*, 16 Fed. Rep. 444; *McElroy v. City of Kansas*, 21 Fed. Rep. 257; *Moore v. Atlanta*, 70 Ga. 611.

⁵ *Chattanooga v. Geiler*, 13 Lea. 611. In *Whitmore v. Village of Tarrytown*, 16 N. Y. Supl. 740, where a road in a village was cut down by the village authorities and a steep embankment left in front of the abutting property, which embank-

ment was subsequently removed at various times, extending through a period of several years, by the village road commissioner with the village teams and employees, although there was no formal resolution of the trustees ordering the removal, it was held that as these acts were done openly the knowledge of the trustees would be presumed, and the village would be liable for damages to the abutting property caused by this removal. In *City of Jeffersonville v. Myers* (Ind.), 28 N. E. Rep. 999, it was held that the owner of a lot abutting on a street, the grade of which had been changed by the action of the United States with the permission of the city council, had a right of action for damages to his lot caused by the change of grade, under the Indiana statute.

§ 1142. The same subject continued—Defective streets.—It is the duty of a city, in grading its streets, to build and finish the slopes on the side of the streets in such a manner that they will be in a reasonably and ordinarily safe condition as to persons lawfully in the streets, and so as not to unnecessarily and unreasonably endanger the lives and limbs of passers-by upon its sidewalks.¹ Under a charter authorizing a city to condemn "an easement in land for the construction of cuts and fills upon real estate abutting on any street," the city may acquire an easement in lots abutting on a street for the purpose of slopes rendered necessary by grading the street above or below the surface of the lots.²

§ 1143. Unauthorized modification of contracts.—A contract for grading a street, with a provision that it shall be brought to a certain height, and that the work should be done under the supervision of the city engineer, does not confer upon the engineer authority to change the grade, or modify in any essential particular the provisions of the contract, unless expressly authorized by the city council;³ and acting as

¹ *Nichols v. City of St. Paul*, 44 Minn. 494; s. c., 47 N. W. Rep. 168.

² *Kuschke v. City of St. Paul* (Minn., 1891), 47 N. W. Rep. 786. In *McDonald v. City of Ashland*, 78 Wis. 251, a bridge built by a private citizen with lumber furnished by the city, and forming part of a sidewalk of a platted city street, and used daily, was a public highway, and the city was responsible for personal injuries occasioned by it being covered with ice. *Tice v. Bay City*, 84 Mich. 461; s. c., 47 N. W. Rep. 1062. In *Thompson v. Village of Quincy*, 83 Mich. 173; s. c., 47 N. W. Rep. 114, evidence of several resolutions of the council, passed during the two years previous to the accident, ordering the repair of the sidewalk, was held admissible to show knowledge of its defective condition, when connected with evidence that the repairs were

not made. As to liability of cities for personal injuries occasioned by defective streets growing out of the duty of cities to construct them properly and keep them in proper repair, under their general power of control, and rules of evidence and instructions to juries in actions against cities for such injuries, see, also, *Nichols v. City of St. Paul*, 44 Minn. 494; s. c., 47 N. W. Rep. 168; *Moore v. City of Plattville* (Wis.), 47 N. W. Rep. 1055; *City of South Omaha v. Cunningham* (Neb.), 47 N. W. Rep. 930.

³ *Murphy v. City of Albina* (Or., 1892), 29 Pac. Rep. 353, an action for extra work on a *quantum meruit*, in which the court affirmed a judgment for the city. See, also, *Bonesteel v. Mayor*, 22 N. Y. 162; *Rens v. City of Grand Rapids*, 73 Mich. 237; s. c., 41 N. W. Rep. 263; *Dillon v. Syr-*

individuals, the members of the city council cannot ratify such a change of contract; they could only do it acting as a body.¹ Such ratification cannot be inferred merely from the acceptance of the work covered by the contract.² Nor can an implied contract be inferred from the fact that a street is subsequently used by the public, to pay for work performed upon the street without the assent of the municipality.³

§ 1144. Rights of abutters.—The individual rights of owners of lots along the streets of a city to a way of ingress or egress through those streets will not be disregarded that public benefits may accrue.⁴

acuse, 9 N. Y. Supl. 98; *Genovese v. Mayor*, 55 N. Y. Super. Ct. 397. The court, in *Murphy v. City of Albina*, *supra*, said:—"When this contract was signed and executed, no officer of defendant had any authority to change its provisions, unless expressly authorized by the common council. That body alone, or some one duly authorized by it, was competent to change the terms of the contract or the grade of the street. The duty of the engineer was to see that the terms of the contract were complied with, and the street brought to the grade as provided therein; and for that purpose, and that alone, he was the agent of the city. But when he assumed to change the grade as established by the city, he was doing an unauthorized act, and one in no way binding on the defendant. The change made by him was a material one, raising the surface of the street from three to ten inches above that established by the city, and, if valid, imposed upon the defendant a liability for \$466 worth of work in excess of its contract, and that without its assent. If such an act is valid and binding on the defendant, there is but little protection for municipal corporations against the unauthorized acts of subordinate agents."

¹ *Murphy v. City of Albina* (Or.,

1892), 29 Pac. Rep. 353; 1 Dillon on Munic. Corp. 455, note; 15 Amer. & Eng. Enc. Law, 1028; *Dey v. Jersey City*, 19 N. J. Eq. 412; *Butler v. Charleston*, 7 Gray, 12; *Turnpike Road Co. v. Craver*, 45 Pa. St. 386; *In re St. Helen's Mill Co.*, 3 Sawy. 88; *Trotman v. San Francisco*, 20 Cal. 96; *Gastwiler v. Willis*, 33 Cal. 11.

² *Murphy v. City of Albina* (Or., 1892), 29 Pac. Rep. 353.

³ *Taft v. Montague*, 14 Mass. 282; *McDonald v. Mayor*, 68 N. Y. 23; *Davis v. School Dist.*, 24 Me. 349; *Pratt v. Swanton*, 15 Vt. 147; *Wilson v. School Dist.*, 32 N. H. 118.

⁴ *Gargan v. Louisville & C. Ry. Co.* (1889), 89 Ky. 212; s. c., 12 S. W. Rep. 259, an action brought by a city under the power given in its charter with a cross-petition of the railway company in whose interest it was to be closed, to close a portion of a street, which was resisted by property owners. The Supreme Court of Kentucky reversed the court below and ordered the petition for vacating the street to be dismissed, the position of the court being that "the corporation, whether municipal or private, seeking to appropriate the street to its own use, must resort to the writ of *ad quod damnum*, and under it compensate the owner for the injury sustained." This court,

§ 1145. **Rights and remedies of abutters.**—The remedy for abutters whose property is damaged by change of grade of a street in a city, provided in a statute of New York by means of an assessment of damages ordered to be made by the board of assessors, and the delivery by the comptroller of assessment bonds in the amount awarded, it has been held was exclusive, and that therefore an action could not be maintained against the city for damages suffered, or for fraud or breach of duty on the part of the assessors in proceedings under the statute.¹ The taking by the public authorities of earth or soil of a road, the fee of which is in the abutters, is justified as incident to the easement vested in the public only so far as the removal of it is necessary in the process of construction and repair; and the digging of gravel from the bed of a road below grade for use on the surface with the intention of filling up the pit thus made with less valuable earth is a violation of the abutter's rights, for which he may maintain an action against the contractor.² Under

in *Lexington &c. R. Co. v. Applegate*, 8 Dana, 289, held this right of property in the streets to be as inviolable as the property in the lots themselves. In *Transylvania University v. City of Lexington*, 3 B. Mon. 27, discussing the constitutional question presented in that case, Robertson, chief justice, for the court said:—“As a private right it must, like that of vicinage, be limited by its own nature and end; that is, chiefly by the necessity of access to, and outlet from, the ground of the proprietor.” In this last case it was held that the owner of ground on any street in Lexington has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services and a convenient outlet to other streets, and of this right the legislature cannot deprive him without his consent or a just compensation in

money. The doctrine of the text is sustained also by the holding in *Fulton v. Short Route Ry. Transfer Co.*, 85 Ky. 640, that the construction of a railroad on a street was not *per se* an encroachment upon the rights of the abutting land-owner; but when deprived of the reasonable use of the street by its construction he may apply to the courts for relief. In *Gargan v. Louisville &c. Ry. Co.*, *supra*, it appeared that the persons owning the lots on this street, a part of which it was proposed to vacate in order to go east where the center of trade lay, would first have to go west to the next street, then north or south to another street, thence east, and for this reason the court held their consent was necessary to the closing of the street.

¹ *Heiser v. City of New York*, 104 N. Y. 68; s. c., 9 N. E. Rep. 866.

² *Robert v. Sadler*, 104 N. Y. 229; s. c., 10 N. E. Rep. 428.

the Pennsylvania statute giving compensation to the owner of a lot damaged by a change of grade of a street, the cause of action accrues at the time of the physical change of grade, and a purchaser of property upon a street the grade of which is not established, but who is aware at the time that it will be changed, is entitled to damages upon actual change of the grade.¹

§ 1146. The same subject continued.— In a case where the city authorities had made an order merely directing curbing to be laid upon a certain street, and the superintendent of streets, in executing the order, lowered the grade of a portion of the street to the grade fixed by the original order laying out the street, it never having been before graded in accordance with that order, apparently, it was held that the remedy of an abutter whose property was injured by such lowering of the grade, and who had not sought or been awarded any damages under the original laying out, was by proceeding under the statute of Massachusetts giving a remedy in case of ordinary repairs, and not under another statute giving a remedy in case of specific repairs so called.²

§ 1147. Interest of abutters in streets.— Any person or corporation having dedicated land to the use of the public, as for a street, is precluded by such appropriation from re-asserting any right to the actual possession of the land, at least so long as it remains in the public use.³ As a general rule no one can acquire, by adverse occupation, as against the public, the right to a street or square dedicated to the public use.⁴ Where a municipal corporation has sold lots which have been

¹ Borough of Freemansburg v. Rodgers (Pa.), 8 Atl. Rep. 872.

² Sullivan v. City of Fall River, 144 Mass. 579; s. c., 12 N. E. Rep. 553.

³ Moose v. Carson (1889), 104 N. C. 431; s. c., 17 Am. St. Rep. 681; Kennedy v. Jones, 11 Ala. 63; Proctor v. Lewiston, 25 Ill. 153; Adams v. Saratoga, 11 Barb. 414; Penny Pot Land-ing v. Philadelphia, 10 Pa. St. 79; Re Pearl Street, 11 Pa. St. 565. In Grogan v. Town of Hayward, 4 Fed.

Rep. 161, where, by laying off streets, third parties had been induced to buy lots adjacent to them and build on the lots, by an individual grantor, the dedication to the public use was held irrevocable, although the streets had not been formally accepted by the authorities of the town. New Orleans v. United States, 10 Pet. 717.

⁴ Hoadley v. City of San Francisco, 50 Cal. 265; People v. Pope, 53 Cal. 437.

improved by the grantees, on account of the advantages of right of right of way over streets bounding their lots, it is neither in the power of the corporation to divest them of their right, nor in the power of the legislature to authorize a re-entry upon such streets and sale of them.¹ Any conveyance by a city of land which has been dedicated to the purposes of a street is void as against one who had purchased city lots abutting upon those streets, because he is entitled to a right of way over those streets as appurtenant to the land.²

§ 1148. **Liability of corporation for consequential injuries.**—The Minnesota Supreme Court have adopted this rule: A municipal corporation is liable for damages caused to private property by grading streets when a private owner of the soil over which the streets are laid would be liable if improving for his own use.³ But a city is not liable for wholly failing to provide drainage or sewerage, nor for a mere error of judgment as to the *plan* of drainage, nor for the insufficient size or capacity of drains or gutters for the purpose intended, at least if the adjoining property is not in any worse condition than if no gutters or drains whatever had been constructed.⁴ A

¹ Adams v. Chicago &c. R. Co., 39 Minn. 286; s. c., 39 N. W. Rep. 629; Brooks v. Riding, 46 Ind. 15.

² Moose v. Carson (1889), 104 N. C. 431; s. c., 17 Am. St. Rep. 681. See, also, Pratt v. Law (1815), 9 Cranch, 456-500; Chaplain v. Brown, 15 R. I. 579; s. c., 10 Atl. Rep. 639; Sarpy v. Municipality, 9 La. Ann. 597; s. c., 61 Am. Dec. 221; Port Hudson v. Chadwick, 52 Mich. 320; Harrison v. Augusta Factory, 73 Ga. 447.

³ O'Brien v. City of St. Paul, 25 Minn. 331; Dyer v. City of St. Paul, 27 Minn. 457; s. c., 8 N. W. Rep. 272; McClure v. City of Red Wing, 28 Minn. 186; s. c., 9 N. W. Rep. 767; Henderson v. City of Minneapolis, 32 Minn. 319; s. c., 20 N. W. Rep. 322.

⁴ Alden v. City of Minneapolis, 24 Minn. 254; McClure v. City of Red Wing, 28 Minn. 186; s. c., 9 N. W.

Rep. 767; Henderson v. City of Minneapolis, 32 Minn. 319; s. c., 20 N. W. Rep. 322. In Defer v. City of Detroit (1887), 67 Mich. 346, it was held that where the plan adopted by a municipal corporation in constructing a public improvement must *necessarily* cause an injury to private property equivalent to some appropriation of the enjoyment thereof to which the owner is entitled the municipality is liable; but where the fault found is with the *wisdom* of the measure, or its *sufficiency* or *adaptability* to carry out or accomplish the purpose intended, and where its construction according to the plan adopted invades no private rights, the municipality is not liable. Detroit v. Beckman, 34 Mich. 125; Ashley v. Port Huron, 35 Mich. 296. Cf. Dermont v. Detroit, 4 Mich. 435. In Pye v. City

city is not liable for consequential injuries to adjoining property, resulting from raising the grade of a street, although the result may be to interfere with the flow of surface water, and cause it to accumulate on the premises of another.¹

§ 1149. **The same subject continued.**—The settled doctrine in New Jersey is that the mere incidental diversion of surface water by a municipality in grading and improving its streets, by which the land of an individual is damaged, does not cause an injury for which redress may be had.² But where a municipality deliberately enters upon a scheme of drainage in pursuance of which it will collect water from a large area and by artificial means cast it upon private property, through which the land from which the water is to be collected would not otherwise be drained, it threatens a wrong the commission of which equity may restrain by injunction.³

of Mankato (1887), 36 Minn. 373; s. c., 31 N. W. Rep. 863, it was held that it amounts to a positive trespass, for which a city is liable, when it intercepts the natural flow of surface water, and gathers it up and conducts it in another direction by means of a gutter or other artificial channel, and constructs the gutter of inadequate capacity, in consequence of which the water is cast in large and injurious quantities upon the premises of any property owner. See, also, *O'Brien v. City of St. Paul*, 18 Minn. 163, 176; *Kobs v. City of Minneapolis*, 22 Minn. 159; *O'Brien v. City of St. Paul*, 25 Minn. 331; *McClure v. City of Red Wing*, 28 Minn. 186; s. c., 9 N. W. Rep. 767; *Hogenson v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 226; s. c., 17 N. W. Rep. 374.

¹ *Lee v. City of Minneapolis*, 22 Minn. 13; *Alden v. City of Minneapolis*, 24 Minn. 254, 263; *O'Brien v. City of St. Paul*, 25 Minn. 331; *Henderson v. City of Minneapolis*, 32 Minn. 319; s. c., 20 N. W. Rep. 322.

² *Town of Union v. Durkes*, 38 N. J. Law, 21.

³ *Soule v. City of Passaic* (N. J. Eq., 1890), 20 Atl. Rep. 346. See *Field v. West Orange*, 36 N. J. Eq. 118; *Same v. Same*, on appeal, 37 N. J. Eq. 600; *Miller v. Mayor & C.* (N. J. Eq., 1890), 20 Atl. Rep. 61, in which it was also held that where the quantity of surface water sent to the point of discharge is increased by an enlargement of the area of drainage, but such enlargement results entirely from making the grade of the streets conform to the grade established by the proper authority, any injury resulting from the increase in the quantity of water discharged at that point is regarded in law as *damnum absque injuria*: but if the municipality, by means of a basin and culvert, discharges all the surface water carried to a particular point in such manner that the water, by its own force, makes a channel through the land of a citizen, a taking of private property for public use occurs; and if no compensation to the owner be provided, the use of his property by the municipality will be enjoined.

§ 1150. **Flowage of surface water from streets.**—The resident owner of a lot fronting upon a public street in a city cannot restrain such city from building drains along the side or culverts across such street or other streets in the vicinity, or from grading or otherwise improving the same, merely because such acts, when completed, would greatly increase the flow of surface water upon his land.¹ In an action for damages done by a flow of water from a street upon the land of a person, caused by the digging of a ditch by a municipality, the person damaged is entitled to recover the cost of filling up his lot where the flooding of the lot is continuous and the filling is necessary in order to keep out the water.²

§ 1151. **The same subject continued.**—Municipal corporations have a right to bring their streets to grade, and are not ordinarily liable for simply failing to provide culverts or gut-

¹ *Heth v. Fond du Lac* (1885), 63 Wis. 228; s. c., 53 Am. Rep. 279; *Waters v. Bay View*, 61 Wis. 642; *Allen v. Chippewa Falls*, 52 Wis. 430; *Hoyt v. Hudson*, 27 Wis. 656; *Turner v. Dartmouth*, 13 Allen, 291; *Barry v. Lowell*, 8 Allen, 127; *Dickinson v. Worcester*, 7 Allen, 19; *Flagg v. Worcester*, 13 Gray, 601; *Parks v. Newburyport*, 10 Gray, 28. In *Heth v. Fond du Lac*, *supra*, the court said:—"The officers of a municipality improving its streets solely for the public benefit, in an honest, skillful and careful manner, may, at least to a certain extent, exercise their own judgment and discretion as to the location and construction of drains and culverts, the grading and improving of streets, and the direction in which surface water shall be compelled to flow." *Smith v. Gould*, 61 Wis. 31; *Harrison v. Milwaukee County*, 51 Wis. 662-64; *Alexander v. Milwaukee*, 16 Wis. 248; *Methodist P. Church v. The Mayor*, 48 Am. Dec. 540.

² In *Weir v. Borough of Plymouth*

(Pa., 1892), 24 Atl. Rep. 94, it was held that where the necessary effect of digging a ditch is to throw water from the public street upon the land of a private person, the municipality that digs the ditch is not relieved of liability for damage done by such water by the fact that the ditch was dug upon the land of a third person with that person's consent. In *Cooper v. City of Dallas* (Tex., 1892), 18 S. W. Rep. 565, an action for damages to property resulting from an overflow caused by a change of grade of a street and insufficiency of a sewer, where it appeared that if plaintiff's premises had been raised to the new grade, which would have cost him \$500, the overflow would have been prevented, and that the value of his property was greatly increased by the grading of the street, it was held error to direct a verdict for the city on the ground of plaintiff's contributory negligence in failing to raise his property to the new grade.

ters adequate to keep surface water off from adjoining lots below grade; but they are liable where the property of private persons is flooded, either directly or by water being set back, where this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts or sewers, or of the negligent failure to keep the same in repair and free from obstruction, whether the lots are below the grade of the streets or not.¹

§ 1152. Flowage of water by construction of a levee.—

A Wisconsin statute authorized a city to build a levee along the banks of a river running through the city for the purpose of reclaiming lands subject to overflow in times of freshet, and to protect its highways from such overflow. It constructed the levee along the lands of an abutting owner in such a manner as to close several natural channels by which the waters of the river had been passing through the lands involved. The land-owner had requested that the levee be extended further to protect certain of his lowlands, but the city declined to extend it. His lands being subsequently overflowed as a result of this construction he brought action against the city for damages. The Supreme Court of Wisconsin held that in view of the foregoing facts the city was liable to him for the damage

¹ 2 Dillon on Munic. Corp., § 1051. In *City of Denver v. Rhodes* (1886), 9 Colo. 554; s. c., 13 Pac. Rep. 729, the holding was that while a municipal corporation could not be compelled to provide waterways of sufficient capacity to carry off all surface waters likely to accumulate in the streets, yet such as the city had provided it was bound to keep in repair and free from obstructions, so that, up to their original capacity, they should be efficient. In *Rutherford v. Village of Holly*, 105 N. Y. 632; s. c., 11 N. E. Rep. 818, reversing 37 Hun, 639, it was held that if a village, in improving a highway, by the construction of gutters and a sluice or sewer, does not increase the flow of surface water on an adjoining lot beyond

what it was before the improvement, it cannot be compelled, by a mandatory injunction at the instance of the lot-owner, to close the sluice. Cf. *Noonan v. City of Albany*, 79 N. Y. 476. In *Rice v. City of Flint* (1887), 67 Mich. 401; s. c., 34 N. W. Rep. 719, the city was held liable for so constructing abutments to a bridge across a river as to cause the water to set back, overflow and discharge into the area, basement, etc., to the injury of the buildings on the premises of the plaintiff. See, also, *Byrnes v. Cohoes*, 67 N. Y. 204; *Inman v. Tripp*, 11 R. I. 520; *Ross v. Clinton*, 46 Iowa, 606; *Ashley v. Port Huron*, 35 Mich. 296; *Pennoyer v. Saginaw*, 8 Mich. 534.

caused by the compressed and accumulated waters of the river overflowing his lowlands;¹ that the city could not justify the submerging and destruction of valuable farms on the ground that the works causing the injury were constructed under a statute specially intended for their protection from floods;² and the land-owner did not waive his right to such damages, nor was he estopped from claiming them, by his having favored the work and offered to give the right of way for the levee or by his afterward refusing to give such right of way until the levee was extended so as to protect his lands. As the building of the levee by the city along the upper portion of his farm and refusing to extend it made it necessary for him to build a levee for the protection of his lowlands, the land-owner had a right to do the work and prove what it would cost to do it, and recover the same as a part of his damages.³

§ 1153. Damages from change of grade.—Where a city changes the grade of a street it is not liable to the abutting land-owner for the damages resulting therefrom to a house erected on the land after the change in the grade was authorized.⁴

¹ *Barden v. City of Portage* (1891), 79 Wis. 126. See, also, *Spelman v. Portage*, 41 Wis. 144, an action for damages occasioned by the construction of a wide embankment on the banks of the same river closing natural channels, and causing the overflow of lands. In that case the court said: — "We know of no principle of law which justified the city in making an embankment without proper culverts or drains, and thus damming up the waters and causing them to destroy the plaintiff's property."

² *Barden v. City of Portage* (1891), 79 Wis. 126. See, also, *Folsom v. Apple River L. D. Co.*, 41 Wis. 602; *Hackstack v. Keshena Imp. Co.*, 66 Wis. 439; *Smith v. Gould*, 61 Wis. 31; *Pettigrew v. Evansville*, 25 Wis. 223; *Arimond v. Green Bay & M. Canal Co.*, 31 Wis. 316.

³ *Barden v. City of Portage* (1891), 79 Wis. 126. See, also, *Thompson v. Milwaukee & C. R. Co.*, 27 Wis. 93; *Price v. Milwaukee & C. R. Co.*, 27 Wis. 98.

⁴ *Groff v. City of Philadelphia* (Pa., 1892), 24 Atl. Rep. 1048. In *O'Brien v. City of Philadelphia* (Pa., 1892), 24 Atl. Rep. 1047, it was held that under the constitutional provision that "municipal and other corporations . . . shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements," one who had built a house on his lot in conformity with the existing physical grade of an old public highway in front of the lot might recover from the city damage to the lot resulting from a change in the grade. See,

§ 1154. **The same subject continued.**— Under the Pennsylvania statute relating to boroughs, the court of quarter sessions having jurisdiction of a grievance suffered by the owner of a lot in a borough growing out of the enactment of an ordinance changing the width of a sidewalk in front of his property, the final order of that court in such a controversy is conclusive and not reviewable by the Supreme Court.¹ A village is liable to abutting owners for damages occasioned by a change in the grade of its streets under the statutes of New York, where the change is made, with its permission, by a railroad company.² The measure of damages to private property damaged by the location and construction of a public improvement, as, for instance, a sewer, near it, such property not being specially benefited by the improvement, is the difference between the value of the property immediately before the location and construction of the improvement and its value immediately afterwards.³ The measure of a lot-owner's

also, *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *New Brighton Borough v. Peirsol*, 107 Pa. St. 280; *Ogden v. City of Philadelphia*, 143 Pa. St. 430; s. c., 22 Atl. Rep. 694; *Philadelphia v. Wright*, 100 Pa. St. 235; *Jones v. Borough of Bangor*, 144 Pa. St. 638; s. c., 23 Atl. Rep. 252, in which case *McCollum, J.* said:—"Injuries to abutting property, caused by a change of grade, or alteration or enlargement of the street, do not necessarily result from the opening of it to public travel. It is true that in a proceeding to recover damages caused by the opening and grading of a street the party must submit his whole claim, embracing consequential as well as direct injuries; but where the grading occurs as a separate act of the public authorities and so long after the opening of the street that the assessment of damages at the time of the appropriation cannot include those resulting from the grading, the latter may be ascertained by a second view." *Pusey v. Allegheny City*, 98 Pa. St. 522.

¹ *Appeal of Borough of Chartiers* (Pa.), 8 Atl. Rep. 181.

² *In re Stock*, 50 Hun, 385; s. c., 3 N. Y. Supl. 231. In *Davis v. City of Crawfordsville*, 119 Ind. 1; s. c., 21 N. E. Rep. 449, it was held that a complaint alleging that the city had opened new streets, some of them parallel to and some intersecting the street in which complainant's property was situated, and that it so established the grade of such streets that the surface drainage from a large part of the city was diverted into the street on which his property was situated and cast on his land which was previously dry and not subject to overflow, did not state a cause of action, as the allegations did not positively show that complainant was injured in consequence of the city's negligence in grading the streets.

³ *City of Plattsmouth v. Boeck* (Neb., 1891), 49 N. W. Rep. 167. See, also, *City of Omaha v. Kramer*, 25 Neb. 489; s. c., 41 N. W. Rep. 295.

damage by reason of the grading of a street, where he has been induced to waive objection to the progress of the work on the condition that the work should be done in a certain manner, and the work is not done as promised, is the loss sustained by him on account of the work not being done as promised.¹

§ 1155. The same subject continued — Connecticut rule. The Connecticut Supreme Court lay down this as the rule whether or not an abutting land-owner can claim damages on account of a change of grade of a street by a municipality:— “[Such an abutter] can sustain no damage to his property unless the exercise of some beneficial right, incident or appurtenant to such property has been impeded or impaired. It must, therefore, appear that there is, as appurtenant to such property, the right of approach, not outside of but within the limits of the public street, in a different manner from that of the public in general,— the right of access below the surface,— to use the sidewalk in a manner for which the general public have neither the occasion nor the power to use it; and in such a manner as is calculated to add to the risk of the public and to the liability of the [municipality].”²

¹ *City of Jeffersonville v. Myers* (Ind.), 28 N. E. Rep. 999. In *Stewart v. City of Council Bluffs* (Iowa), 50 N. W. Rep. 219, an instruction that the measure of damages in an action for damages caused by a change of grade of a street was the cost of restoring the property to the exact condition it was in before the change of grade, less resulting benefits, was held to be misleading, as not plainly and directly stating the rule that the difference in value before and after the change of grade is the measure of recovery.

² *Shelton Co. v. Borough of Birmingham* (Conn., 1892), 24 Atl. Rep. 978, in which, upon the doctrine as announced in the text, the court held that the fact that such change of grade rendered useless an abutting owner's steps which projected into

the sidewalk, and which he had used without objection for twenty years as a means of access to his basement, was not an element of special damage, the borough charter conferring “sole and exclusive authority and control over all streets,” and plaintiff having acquired no right to obstruct any part of the sidewalk with steps. See, also, *Littlefield v. City of Norwich*, 40 Conn. 406; *New Haven v. Sargent*, 38 Conn. 52–56; *Woodruff v. Neal*, 28 Conn. 166, as to what a municipality may do looking to its liability for injuries to persons growing out of its control of streets; *Beardsley v. City of Hartford*, 50 Conn. 529, in which the court said:— The city had no power to erect a railing that would simply fence in, in front and on the sides, the basement stairway,

§ 1156. The same subject continued — “Damage” clause in constitutions.— If consequential damages result to property owners from raising or lowering the grade of a street by a municipality, it is not a taking of private property for public use under the provisions of the constitution, and if a municipality act under authority of law in making a change of grade and with due care, it is not liable for consequential damages to abutting property unless made so by statute or constitutional provision.¹

§ 1157. The same subject continued — Measure of damages.— When city property is damaged by reason of the grading of the street upon which it abuts, the owner is entitled to remuneration. The difference in the market value of the property with the improvement and that without it, not considering general benefits shared by the general public, is the rule of compensation. In such case special benefits to the property directly attributable to the improvement may be set off against the damages sustained by the owner.² The market value of such property is not what that property is worth solely for the purpose to which it is devoted, but the highest price it will bring for any or all uses to which it is adapted and for which it is available.³

because “it would have had to go upon private ground to do this; and that it had no right to do. It could only make a railing along the outer line of the sidewalk, in front of the stairway.”

¹ *Smith v. City of Eau Claire* (Wis., 1891), 47 N. W. Rep. 830. See, also, *Alexander v. Milwaukee*, 16 Wis. 247; *Dore v. Milwaukee*, 42 Wis. 108; *Wallich v. Manitowoc*, 57 Wis. 9; s. c., 14 N. W. Rep. 812; *Dillon on Munic. Corp.*, §§ 989, 990. The Wisconsin Supreme Court distinguishes the cases cited to the contrary from Illinois, Nebraska, Georgia, California, Missouri and West Virginia in this, that the constitution of each of those States provides that private property shall not be taken or dam-

aged for public use without just compensation therefor, and that the cases cited enforced damages in such cases solely on the ground that the words “or damaged” were contained in the respective constitutions of those States.

² *Lowe v. City of Omaha* (Neb., 1891), 50 N. W. Rep. 760; *Schaller v. City of Omaha*, 23 Neb. 325; s. c., 36 N. W. Rep. 533; *City of Omaha v. Kramer*, 25 Neb. 489; s. c., 41 N. W. Rep. 295.

³ *Lowe v. City of Omaha* (Neb., 1891), 50 N. W. Rep. 760. See, also, *In re Furman St.*, 17 Wend. 649; *Boom Co. v. Patterson*, 98 U. S. 403; *King v. Railway Co.*, 32 Minn. 224; s. c., 20 N. W. Rep. 185; *Goodin v. Canal Co.*, 18 Ohio St. 169.

§ 1158. Damages by change of grade further considered. The owner of a city lot abutting on a street is entitled to recover damages from the city for injury to his property caused by grading the street, though the street has never been graded before, where the constitution of the State provides that "private property shall not be taken or damaged for public use without just compensation."¹ The measure of damages to the property of an owner of an abutting lot, where the grading of a street has been paid for in part by a special tax on the property, is the amount the property has been injured less the benefits, if any, accruing to the property from grading the street, but from such benefits should be subtracted the sum paid as a special tax on the property.²

§ 1159. The same subject continued — Common-law action.— If a city orders an improvement — as a change of grade

¹City of Bloomington v. Pollock (Ill., 1892), 31 N. E. Rep. 146. The Supreme Court of Illinois said:—"It would seem then, in respect to the legal liability of a municipal corporation for damage done in grading its streets, that it is wholly immaterial from a legal standpoint whether such grading is done under an ordinance establishing a grade in the first instance, or under an ordinance abandoning the grade; for even if there be a prior ordinance it does not have the elements of a contract, does not impose a legal duty to level or bring the streets to the grade fixed by it, and does not prevent the municipality from placing its streets at any grade that it may thereafter ordain. In other words, either with or without a prior ordinance, the city is free to establish by ordinance any grade it sees fit, subject only to the qualification that such grade is not so wholly unreasonable as to render the ordinance void."

²City of Bloomington v. Pollock (Ill., 1892), 31 N. E. Rep. 146. Upon this point the Supreme Court adopt

the language of Wall, J., of the Appellate Court, in City of Bloomington v. Pollock, 38 Ill. App. 133, which was in the case above affirmed, as follows:—"The case is one where plaintiff seeks the 'just compensation' guaranteed by the constitution where private property has been damaged for public use. In respect to property not taken but damaged merely, the compensation is the amount of the damage less the benefit conferred. Now should the benefit be considered without regard to the cost of it to the owner of the property? Manifestly he is not benefited the whole sum of benefit conferred, because he has been compelled to pay a certain amount by way of assessment in order to obtain whatever benefit is attributable to the improvement. It is the net benefit which shall be deducted from the damage produced by the improvement, and the sum remaining will represent the 'just compensation' which he will be entitled to. This will usually be more than the difference in market value. At least it is so theoretically in all

of a street, for instance—and does not follow the requirements of the statute empowering its authorities to order such improvement in every particular, as to notice, etc., to owners of abutting lands, the owner of the property, if it sustains damages as a result of such improvement, can maintain his action against the corporation for such damages where the statute has allowed damages. And the corporation having failed to give proper notice as directed by the statute, and to observe any other requirements of the statute, cannot have such action dismissed on the ground that the statute provided for an appeal from the award of damages by the commissioner on damages to property and the property owner had failed to make such an appeal.¹

§ 1160. Right to damages in Pennsylvania.—Under the provision of the constitution of Pennsylvania that “municipal and other corporations invested with the privilege of taking property for public use shall make just compensation

cases, for it is presumable that the market value is diminished to the extent of the damage less the benefit.”

¹*City of Topeka v. Sells* (Kan., 1892), 29 Pac. Rep. 604, in which the court said:—“Notice to the owner is of the essence of all proceedings affecting property, and the vital complaint here is that the notice given to [the property owner] did not inform him that the proposed change of the grade of the street in front of his property was to be lowered, but did acquaint him with the fact that it was to be slightly raised, and this was in effect a notice to him that his property would not be materially injured by such change. When the change was made, however, and the street made to conform thereto, it was found that the street in front of his building was lowered eighteen inches. The city, therefore, did not give him notice of what they intended to do, nor did the city authorities conform to the terms of the notice given.” See, also, as to liability of

corporation to common-law action for damages, *Healey v. City of New Haven*, 49 Conn. 394; *City of Elgin v. Eaton*, 83 Ill. 532; *People v. McRoberts*, 62 Ill. 38; *Clayburgh v. City of Chicago*, 25 Ill. 535; *City of La Fayette v. Wortman*, 107 Ind. 404; s. c., 8 N. E. Rep. 277. Under the statutes of Indiana, changes of grade of streets cannot be made lawfully without first having damages to abutter's property assessed and tendered. *City of Logansport v. Pollard*, 50 Ind. 151; *City of Kokomo v. Mahan*, 100 Ind. 242; *Mattingly v. City of Plymouth*, 100 Ind. 545. A change of grade of a street without such an assurance and tender of damages is therefore an affirmative wrong or misfeasance and an action for damages lies. *Noyes v. Mason City*, 53 Iowa, 418; s. c., 5 N. W. Rep. 593; *Hempstead v. Des Moines*, 52 Iowa, 303; s. c., 3 N. W. Rep. 123; *Dore v. City of Milwaukee*, 42 Wis. 108; *Wright v. Corporation*, 4 Cranch, C. C. 534.

for property taken or destroyed by the construction or enlargement of their works or improvements," if there is such an actual and immediate depreciation in the value of property, following immediately upon the construction complained of, as to constitute a material injury to the property,—as, for instance, where a municipality erects public works, changes or improves highways so as to depreciate the market value of any property in the neighborhood of such works,—a right of action for such damages against the corporation would accrue to one whose property was thus depreciated in value. But such an action will not lie against the corporation upon the fact that because of an error of judgment on the part of the municipal authorities in the exercise of their legislative functions, a sewer was inadequate for the purpose for which it was constructed by reason of which water was dammed up, thrown back upon his premises, undermining and causing damage thereto.¹

§ 1161. Estoppel of land-owner.—A property owner petitioning the governing board of a municipality to order an improvement, who also stands by and sees the work in progress without a word of dissent, is estopped from claiming any remuneration from the municipality for the damage his property may have sustained by reason of the work.² A property owner who has consented to a change of grade of a street, and has signed a petition for the change, is estopped thereby from setting up a claim for damages on the ground that the petition was not signed by property holders owning a majority of front feet of property abutting upon the part improved.³

§ 1162. Estoppel further considered.—Where commissioners for assessment of damages under the Missouri statutes for opening a public road on petition, in the exercise of their power to take into consideration the advantages as well as the

¹ *Bear v. City of Allentown* (Pa. St. 1892), 23 Atl. Rep. 1062. See, also, *Collins v. City of Philadelphia*, and *Hoff v. City of Philadelphia*, 93 Pa. St. 272.

v. Gilbert, 31 Iowa, 356; *Motz v. City of Detroit*, 18 Mich. 496; *Palmer v. Stumph*, 29 Ind. 329; *Hellenkamp v. City of La Fayette*, 30 Ind. 192; *Herman on Estoppel*, § 554.

² *Cross v. City of Kansas* (1886), 90 Mo. 13. See, also, *City of Burlington*

³ *Cross v. City of Kansas*, 90 Mo. 13; s. c., 1 S. W. Rep. 749.

disadvantages resulting from the establishment of the road to the land over which it runs, have determined that the benefit peculiar to the land not taken is a full equivalent for the land taken, and that the owner of it is not entitled to any damages, the owner of such land cannot enjoin the establishment of the road on the ground that he has not been allowed any damages.¹ A commissioner of highways has no right, by virtue of his office, to take materials from the adjoining land to repair the road without the consent of the land-owner.² A tax-payer is not estopped from asserting a jurisdictional defect in proceedings for the improvement of a highway when he had no knowledge of the defect at the time the proceedings were instituted, nor until after the improvement had been completed.³

§ 1163. Action by abutters — Pleading.— It has been held in Alabama that a complaint alleging that a city wantonly, wrongfully and illegally cut down the sidewalks adjoining plaintiff's lot, so as to injure and destroy its value, was not demurrable for failure to state that such alterations were not required to render the street ordinarily safe and convenient, where the city had general power to alter its streets with that view, without incurring liability for injuries to abutting property.⁴ A petition in an action against a city for damages to the property of the plaintiff caused by a street improvement alleging that he was the owner of a lot on a certain street; that said city had cut down, graded and improved without any condemnation proceedings, without the making of any estimate of the cost of the work, without any petition having been presented to the city council, or any resolution having been passed or entered on the journal, or any attempt to as-

¹ *Lingo v. Burford* (Mo.), 18 S. W. Rep. 1081, following *Dougherty v. Brown*, 91 Mo. 26; s. c., 3 S. W. Rep. 810. In *Stewart v. Hovey* (Kan.), 26 Pac. Rep. 688, it was held that though a land-holder be one of the signers of a petition for the improvement of county roads, which the Kansas statute requires shall be signed by a majority of the resident land-holders

within the termini mentioned, he is not thereby estopped from asserting a jurisdictional defect for lack of sufficient signatures.

² *Duryea v. Smith*, 16 N. Y. Supl. 688.

³ *Barker v. Hovey* (Kan.), 26 Pac. Rep. 585.

⁴ *City of Montgomery v. Townsend*, 84 Ala. 478; s. c., 4 So. Rep. 780.

certain the amounts chargeable against the lots fronting on said street or the benefits to accrue to the owners, and without any lawful assessment of the same, or any notice of such assessment, has been held in Wisconsin, on demurrer, to state no cause of action.¹ An instruction to a jury that they should consider "the improvement of the street as contemplated by the ordinance changing the grade" was held not to be error in an Iowa case; for although the ordinance did not in terms allude to an improvement, such improvement was the purpose of the city council and was in fact accomplished. And there was no prejudice to the plaintiff by an instruction that by the change of grade a building was left "some two feet below the newly-established grade," the fact being that the building was two and one-half feet below the grade, and the court did not intend to make an exact statement.²

§ 1164. Questions for the jury.— In Alabama it has been held, under former constitutional provisions that private property could not be taken or applied "by municipal corporations for public use" without making just compensation, this excluded a liability for consequential injuries where there was no taking or appropriation of the property itself. But the provision in the present constitution which requires corporations invested with the power of taking private property for public use "to make just compensation for the property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements" should be liberally construed in favor of the citizen.³ Under this consti-

¹ *Meinzer v. City of Racine*, 68 Wis. 241; s. c., 32 N. W. Rep. 139.

² *McCash v. City of Burlington*, 72 Iowa, 26; s. c., 33 N. W. Rep. 346. In this case a verdict that the property was not injured, but rather was benefited by the change, was held to have been supported by evidence showing that by the change in the grade the waters of a stream running through the street were provided for so as to avoid the liability to overflow.

³ *City of Montgomery v. Townsend*, 80 Ala. 489; s. c., 2 So. Rep. 155. And,

upon this idea, the court held that if one damaged is entitled to recover compensation for the injury to his property, the measure of his damages is the difference in the market value of his lot before and after the sidewalk was cut down; and neither the falling of his brick wall, nor the apprehended undermining of his house by subsequent rains, could be considered in estimating the damages; also that a material change in a street, caused by a contingency which could not have been reasonably and fairly

tutional provision, a city is liable for damages to real estate caused by cutting down the adjacent sidewalks, which produces such a material change as could not have been reasonably foreseen at the time of the original dedication of the street, or if done merely to increase the public convenience above the ordinary standard of "useful, convenient and safe," or for ornamentation.¹

foreseen at the time of the original taking, or made merely because the corporate authorities may judge that the public convenience would be thereby increased, or the general appearance of the streets improved, if injury is thereby caused to the adjoining premises, is a new injury for which compensation may be claimed; and that, as whether the cutting down of a sidewalk adjacent to the plaintiff's lot to the level of the street, fifteen feet below, was a construction of the highway within the meaning of the constitutional provision, was a question of fact for the decision of the jury, it was error to instruct them that the plaintiff was entitled to recover if his property was injured, without regard to the circumstances, or character of the alteration. Such damages must be confined to such as result directly from cutting down the street, and not include such as are consequential.

¹City of Montgomery v. Townsend, 84 Ala. 478; s. c., 4 So. Rep. 780, holding further that whether cutting down the sidewalks was such an injury to plaintiff's property was a mixed question of law and fact for the jury, under proper instructions and with particular regard to the local situation of the property. So,

in Conklin v. City of Keokuk, 73 Iowa, 343; s. c., 35 N. W. Rep. 444, the Iowa Supreme Court held that under the provision of the code that "when any city or town shall have established the grade of any street or alley, and any person shall have built or made any improvement on such street or alley, according to the established grade thereof, and such city or town shall alter such established grade in such a manner as to injure or depreciate the value of said property, said city or town shall pay the amount of the damages caused by the alteration," the question whether improvements have been made "according to the established grade" is one of fact for the jury; and that an instruction that if the respondent's intestate "intentionally built his improvements above the grade line as established by the ordinances of the city, this would be building according to established grade, and with reference thereto, and to correspond with it, within the meaning of the statute," was erroneous, as it made the question as to whether the improvements were made according to the grade depend entirely upon the intention of the builder, and a verdict thereupon in favor of the person damaged must be set aside.

CHAPTER XXVIII.

LOCAL ASSESSMENTS.

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| <p>§ 1165. Theory supporting local assessments.</p> <p>1166. Express legislative authority requisite.</p> <p>1167. The same subject continued—Illustrations.</p> <p>1168. A continuing power.</p> <p>1169. What constitutes a local improvement.</p> <p>1170. Purposes for assessment illustrated.</p> <p>1171. The same subject continued</p> <p>1172. Assessable property—Statutory exemptions.</p> <p>1173. Statutory exemptions continued.</p> <p>1174. Assessments against railroad companies.</p> <p>1175. Assessment districts.</p> <p>1176. The same subject continued.</p> <p>1177. Prescribed formalities must be strictly followed.</p> <p>1178. The same subject continued.</p> <p>1179. Ordinance or resolution.</p> <p>1180. Petition.</p> <p>1181. The same subject continued.</p> <p>1182. Description of improvement.</p> <p>1183. Delegation of matters of detail.</p> <p>1184. Necessity of prescribed rule of apportionment.</p> | <p>§ 1185. Notice—<i>Stewart v. Palmer</i>.</p> <p>1186. The same subject continued—<i>Ulman v. Mayor &c.</i></p> <p>1187. The same subject continued—<i>Amery v. City of Keokuk</i>.</p> <p>1188. Notice at some stage of proceedings.</p> <p>1189. Personal liability of landowner.</p> <p>1190. Recovery of money paid on illegal assessments.</p> <p>1191. The same subject continued.</p> <p>1192. The same subject continued—Coercion in law.</p> <p>1193. Apportionment by superficial area.</p> <p>1194. Apportionment by value—Rule in Arkansas and Tennessee.</p> <p>1195. The frontage rule.</p> <p>1196. Assessments exceeding value of property.</p> <p>1197. Assessments according to benefit.</p> <p>1198. Rule in sewer assessments.</p> <p>1199. Contractor's default no defense to the lot-owner.</p> <p>1200. Injunction against illegal assessments.</p> <p>1201. The same subject continued.</p> |
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§ 1165. Theory supporting local assessments.—The authority of the legislature, either directly or through its local instrumentalities, to exercise the taxing power in the form of local or special assessments, is as well established as it is possible by judicial decision to establish any legal principle whatever. Judge Cooley, in discussing the *rationale* of the system, says that special assessments “are made upon the assumption

that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it."¹ Chief Justice Slidell, of the Supreme Court of Louisiana, expressed his conviction that the system of paying for such improvements wholly out of the general treasury was inequitable, and would result in great extravagance, abuse and injustice, and that it was safer and more just to compel the particular localities specially benefited to bear a special portion of the burden.² "While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few. . . . General taxation for a mere local purpose is unjust: it burdens those who are not benefited, and benefits those who are exempt from the burden."³

¹ Cooley on Taxation, 606. See, also, Burroughs on Taxation, 460.

² *Municipality v. Dunn*, 10 La. Ann. 57, approved by Judge Dillon in 2 Dillon on Munic. Corp., § 753, n.

³ *Lockwood v. St. Louis*, 24 Mo. 20. See, also, *City of Raleigh v. Peace* (1892), 110 N. C. 32; *Wilmington v. Yopp*, 71 N. C. 76; *Cain v. Comm'rs*, 86 N. C. 8; *Busbee v. Comm'rs*, 93 N. C. 143; *Cooley's Const. Lim.* 498, 506; 2 Dillon's Munic. Corp., § 755 *et seq.*; 1 Hare's Am. Const. Law, 301; Elliott on Roads & Streets, 370. Some of the practical advantages of the system are well stated by Judge Cooley, and although his remarks have special reference to the propriety of imposing these burdens upon political divisions rather than on the State at large, they apply with equal force where the question arises between those divisions and particular districts within them:—"When each community is thus taxed for those works only which are constructed in the immediate vicinity, and the importance of which its members may

be supposed to feel and appreciate, it is reasonable to expect that they will bear the cost more willingly and cheerfully than they would their proportion of a work at a distance, of the necessity of which they could know nothing except by report, and the demand for construction of which they might attribute to local or personal considerations. These are not the only reasons for leaving highways and other public works of a similar nature to be constructed by the local divisions of a State only. Such a course has been found conducive to economy in expenditure, because the community upon whom the whole cost falls have the opportunity, and will be certain to have the disposition, to watch with reasonable jealousy, in order to see that nothing is wasted and nothing plundered. At the same time as all local improvements tend to confer special and peculiar benefits upon the local community beyond what are received by the State at large, the people thus immediately and specially benefited may

§ 1166. **Express legislative authority requisite.**—Municipal authorities cannot levy an assessment for an improvement without express legislative permission.¹ The power cannot be inferred from the general welfare clause in a charter;² nor from the ordinary grant of power to levy taxes;³ nor from the power to make improvements.⁴ And the language of the statute or charter conferring authority will be strictly construed and confined to cases that are clearly and unmistakably within its scope.⁵

generally be relied upon to make liberal appropriations for the public works which are to add to the comforts, conveniences, and perhaps the adornment of their neighborhood, because the very moneys they thus vote appear to return to them in the increased value which the expenditure confers upon their estates." Cooley on Taxation, 147. In Colorado, the assessment for the cost of sidewalks was formerly solely under the police power. *Palmer v. Way*, 6 Colo. 106; *Wilson v. Chilcott*, 12 Colo. 600, in which cases the court said that special assessments against the abutting lots for street improvements could not be sustained under the taxing power. But in *City of Denver v. Knowles* (Colo., 1892), 30 Pac. Rep. 1041 (one judge dissenting), the distinction between local assessments and taxes levied for general purposes was expressly adopted, and assessments for grading and paving were held not to infringe the rule requiring all taxes to be uniform.

¹ *Vaughn v. City of Ashland* (Wis.), 37 N. W. Rep. 809; *Minnesota Linsseed Oil Co. v. Palmer*, 20 Minn. 468; *Drake v. Phillips*, 40 Ill. 388; *Flew-ellen v. Proetzel* (Tex., 1891), 15 S. W. Rep. 1043.

² *Savannah v. Hartridge*, 8 Ga. 23; *Green v. Ward*, 82 Va. 324; *Winston v. Taylor*, 99 N. C. 210; *Mays v. Cincinnati*, 1 Ohio St. 268; *Lott v. Ross*, 38 Ala. 186; *Cincinnati v. Bryson*, 15 Ohio, 625.

³ Cooley on Taxation (2d ed.), 609, citing *Sharp v. Speir*, 4 Hill, 76; *First Presbyterian Church v. Fort Wayne*, 36 Ind. 338; *Appeal of Powers*, 29 Mich. 504; *Hitchcock v. Galveston*, 96 U. S. 341.

⁴ *Fairfield v. Ratcliff*, 20 Iowa, 396, where it was decided that power "to regulate and improve sidewalks" did not authorize a special assessment. *Annapolis v. Harwood*, 32 Md. 471; *Wright v. Chicago*, 20 Ill. 252; *Columbia v. Hunt*, 5 Rich. (S. C.) 550. See, also, *Bucknall v. Story*, 36 Cal. 67; *Wilhams v. Detroit*, 2 Mich. 560; *Augusta v. Dunbar*, 50 Ga. 387; *Gridley v. Bloomington*, 88 Ill. 555.

⁵ *Reed v. Toledo*, 18 Ohio, 161; *Walker v. District of Columbia*, 6 Mackey, 352; s. c., 12 Cent. Rep. 408; *Allentown v. Henry*, 73 Pa. St. 404; *City v. Murphy*, 79 Ga. 101; 3 S. E. Rep. 326; *Vance v. Little Rock*, 30 Ark. 439; *Nelson v. La Porte*, 33 Ind. 258; *Caldwell v. Rupert*, 10 Bush (Ky.), 182. "The power must be clear, plain and undoubted." *Dillon, J., in McNamara v. Estes*, 22 Iowa, 246. See, also, *Thompson v. Schermerhorn*, 2 Seld. (N. Y.) 92; *Clark v. Davenport*, 14 Iowa, 494; *Lake v. Williamsburg*, 4 Denio, 520; *Howell v. Buffalo*, 15 N. Y. 512; *Manice v. Mayor &c.*, 8 N. Y. 120; *Kyle v. Malin*, 8 Md. 34, 37; *Clark v. Des Moines*, 19 Iowa, 198; *Meech v. Buffalo*, 29 N. Y. 198; *Scovill v. Cleveland*, 1 Ohio, St. 126.

§ 1167. The same subject continued — Illustrations.— “Perceiving and fully admitting the danger of giving elasticity to words conferring upon municipal corporations such high and great power as the power to levy a special tax and sell for default of payment,” said Judge Dillon,¹ “we must nevertheless give them a reasonable construction, one which will truly reflect the legislative mind.” Accordingly, it was held that “macadamizing” included “trimming” and “guttering” an already graded street.² Authority to pave includes all that is necessary, usual or fit in paving.³ But it would not sustain an assessment for grading preparatory to paving.⁴

§ 1168. A continuing power.— Unless restrained by the charter, under which the authority to impose special assessments is granted, that power is not spent when one improvement is made. It is a continuing power, and whenever its exercise becomes again necessary by reason of the destruction or inutility of the original improvement, it may be again exerted.⁵

§ 1169. What constitutes a local improvement.— The constitution of Minnesota authorizes an assessment for a

¹ In *McNamara v. Estes*, 22 Iowa, 246, 254.

² *McNamara v. Estes*, 22 Iowa, 216. See, also, *Elliott on Roads and Streets*, 374; *McNair v. Ostrander* (Wash.), 23 Pac. Rep. 414. But power to macadamize would not include the sidewalk. *Himmelman v. Satterlee*, 50 Cal. 68; *Dyer v. Chase*, 53 Cal. 440.

³ *In re Burmeister*, 76 N. Y. 174; *Bigelow v. Perth Amboy*, 25 N. J. Law, 297. Includes the paving of a cross-walk. *Matter of Burke*, 63 N. Y. 224. Whether or not curb-stones are ordinarily used in paving sidewalks is a question of fact for the jury. *Schenley v. Commonwealth*, 36 Pa. St. 29.

⁴ *Green v. Ward*, 82 Va. 324. Necessary excavations to prepare the street for new paving material were held not to constitute a “grading”

in *Gibson v. Keyser*, 16 Mo. App. 404. Whether certain work is “reconstruction” or “repairs” is a mixed question of law and fact. *O’Meara v. Green*, 25 Mo. App. 199.

⁵ *McKevitt v. Hoboken*, 45 N. J. Law, 482 (sewer); *Jelliff v. City of Newark*, 48 N. J. Law, 101; *Green v. Hotaling*, 44 N. J. Law, 347 (repaving street); *Municipality v. Dunn*, 10 La. 57 (repaving); *City of Lafayette v. Fowler*, 34 Ind. 140; *Board &c. v. Fuller*, 111 Ind. 410; *Williams v. Detroit*, 45 Mich. 431; *Gurnee v. Chicago*, 40 Ill. 165; *Wilkins v. Detroit*, 46 Mich. 120; *In re Burmeister*, 76 N. Y. 174; *Shepley v. Detroit*, 45 Mich. 581; *Delphi v. Evans*, 36 Ind. 99; *Kokotno v. Mahan*, 100 Ind. 242; *Farrar v. St. Louis*, 80 Mo. 379; *Estes v. Owen*, 90 Mo. 113. In Pennsylvania, an assessment for *repaving* is not permitted,

“local improvement” upon the basis of frontage. It was contended that street sprinkling was not within the meaning of the term quoted, because it lacked the element of permanence; that to constitute an improvement there must be some work or structure, such as a pavement, sidewalk, or the like, that will remain after the labor is performed, and permanently enhance the value of the property. The court discussed and disposed of this objection in the following language:—
“But if permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement? It certainly will not be claimed that the work must be eternal in duration, or imperishable in character. We are unable to see any distinction in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block of pavement or wooden sidewalk, which wears out or decays and has to be rebuilt every few years. When a pavement or sidewalk is worn out, the future value of the property is not enhanced by it any more than it is by street sprinkling when that ceases. Neither do we see any difference whether the substance applied to the surface of the street is wood, which has to be rebuilt every few years, or water which has to be applied daily. Each benefits the adjacent property owners as long as it lasts and no longer. It is not the advantageous use or its comparative durability but the *result accomplished* which must determine whether a work is an improvement in the sense in which that word is here used. The only essential elements of a ‘local improvement’ are those which the term itself implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature and not enjoyed by property generally in the city.”¹

as the property is not in such case deemed to receive a special benefit not shared by the public at large. *Hammett v. Philadelphia*, 65 Pa. St. 148; *Wistar v. Philadelphia*, 111 Pa. St. 604; *Orphan Asylum’s Appeal*, 111 Pa. St. 135; *Alcorn v. Philadelphia*, 112 Pa. St. 494.

¹ *State v. Reis*, 88 Minn. 371. “If it

does this,” continued the court,—
“rendering the property more attractive and comfortable, and hence more valuable for use,—then it is an improvement. That the regular and systematic sprinkling of a street has this effect on the property fronting on it is a matter of common knowledge.”

§ 1170. Purposes for assessment illustrated.—No decision has ever attempted to enumerate the purposes for which special assessments may be levied, for the obvious reason that it is impossible to do so.¹ The following are some of the purposes for which special assessments have been held to be proper:—Opening streets;² for grading streets;³ for paving, repaving and other improvements of that character;⁴ altering and extending streets;⁵ for sprinkling⁶ and sweeping streets.⁷

§ 1171. The same subject continued.—The cost of constructing and maintaining sewers and culverts in cities and villages is a proper subject for local assessments.⁸ Where

¹State v. Reis, 38 Minn. 371.

²Matter of Twenty-sixth Street, 12 Wend. 203; Hammett v. Philadelphia, 65 Pa. St. 146; Matter of De Graw Street, 18 Wend. 568; Nicols v. Bridgeport, 23 Conn. 189; Holton v. Milwaukee, 31 Wis. 27; Livingston v. New York, 8 Wend. 85; McMasters v. Commonwealth, 3 Watts, 292; Litchfield v. Vernon, 41 N. Y. 123; Holmes v. Jersey City, 12 N. J. Eq. 299; State v. Dean, 23 N. J. Eq. 335.

³La Fayette v. Fowler, 34 Ind. 140; Wray v. Pittsburgh, 46 Pa. St. 365. And regrading. McVerry v. Boyd, 89 Cal. 304; s. c., 26 Pac. Rep. 885.

⁴O'Leary v. How, 7 La. Ann. 25; Municipality v. Dunn, 10 La. Ann. 57; Schenley v. Commonwealth, 36 Pa. St. 29; Sheeley v. Detroit, 45 Mich. 425; Williams v. Detroit, 2 Mich. 560; Wilkins v. Detroit, 46 Mich. 120; Bagg v. Detroit, 5 Mich. 336; McCormack v. Patchin, 53 Mo. 33; Richards v. Cincinnati, 31 Ohio St. 506; Cleveland v. Wick, 18 Ohio St. 303; Indianapolis v. Mansur, 15 Ind. 112; Mason v. City of Sioux Falls (So. Dak.), 51 N. W. Rep. 770; Morrison v. Hershire, 32 Iowa, 271; State v. Atlantic, 34 N. J. Law, 99; Dean v. Carron, 26 N. J. Law, 228; State v. Newark (N. J.), 12 Atl. Rep. 770; State v. Brunswick, 32 N. J.

Law, 548; Willard v. Presbury, 14 Wall. 676; Chambers v. Satterlee, 40 Cal. 497; People v. Austin, 47 Cal. 353; Bradley v. McAtee, 7 Bush, 667; State v. Christopher, 12 Wis. 627; Dean v. Borchesnius, 30 Wis. 236; Matter of Burke, 62 N. Y. 224; People v. Brooklyn, 4 N. Y. 419; In re Burmeister, 76 N. Y. 174; Petition of Garvey, 77 N. Y. 523; In re Dugro, 50 N. Y. 513; In re Astor, 53 N. Y. 617; In re Smith, 99 N. Y. 423; Macon v. Patty, 57 Miss. 378.

⁵Hancock Street Extension, 18 Pa. St. 26; Jones v. Boston, 104 Mass. 461.

⁶State v. Reis, 38 Minn. 371, cited in the preceding section. See, also, Tift v. City of Buffalo, 7 N. Y. Supl. 683.

⁷Reinken v. Fuehring (Ind.), 30 N. E. Rep. 414, where it was held proper to include the sweeping of crossings.

⁸Cincinnati v. Kasselmann (Ohio), 23 Weekly Law Bul. 392; Wolf v. Philadelphia, 105 Pa. St. 25; City of Atchison v. Price (Kan.), 25 Pac. Rep. 605; Stroud v. Philadelphia, 61 Pa. St. 255; Commonwealth v. Woods, 44 Pa. St. 113; Mauch Chunk v. Shortz, 61 Pa. St. 399; Philadelphia v. Tryon, 85 Pa. St. 401; Wright v. Boston, 9 Cush. 233; City of Springfield v. Sale, 127 Ill. 359; People v. Brooklyn, 23 Barb. 166; Heman

the law prescribed certain formalities for the passage of a resolution by the city council authorizing a "public" improvement, it was held that a resolution for building a sewer related to a local improvement and therefore was not within the terms of the statute.¹ In one case, at least, the express power to make and maintain highways and streets by special assessments was held to authorize the construction of sewers in the same manner.² In Pennsylvania, while the cost of the original paving of a street may be assessed against property abutting thereon, the repaving of such a roadway is deemed to be a purely public duty for the general benefit, the cost of which cannot be imposed upon the abutting lands.³ But the maintenance as well as the construction of sewers and sidewalks may be charged to the abutting owners.⁴ Water pipes in the streets⁵ and lighting the streets are within the same rule.⁶

v. Wolf, 33 Mo. App. 200; *St. Louis v. Oeters*, 36 Mo. 456; *Hill v. Warrell* (Mich.), 49 N. W. Rep. 479; *Walker v. City of Aurora* (Ill.), 29 N. E. Rep. 741, where a sewer assessment was sustained though no water-mains had been laid in the street, distinguishing *Hutt v. City of Chicago*, 132 Ill. 352.

¹ *Kinsella v. City of Auburn*, 7 N. Y. Supl. 317.

² *Cone v. Hartford*, 28 Conn. 363. See, also, *Hungerford v. Hartford*, 39 Conn. 279; *Clapp v. Hartford*, 35 Conn. 66.

³ *Williamsport City v. Beck*, 128 Pa. St. 147; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Wistar v. Philadelphia*, 80 Pa. St. 505.

⁴ *Protestant Orphan Asylum's Appeal*, 111 Pa. St. 135, 142. One who has paid a tax for a sewer in front of his property cannot be compelled to pay a second tax for another sewer parallel therewith in the same street. *Philadelphia v. Verner*, 8 Pa. Co. Ct.

Rep. 97. Cf. *Michener v. City of Philadelphia*, 118 Pa. St. 535; s. c., 12 Atl. Rep. 174. That special assessments may be levied for the construction of sidewalks, see *Kemper v. King*, 11 Mo. App. 116; *Flint v. Webb*, 25 Minn. 93; *White v. People*, 94 Ill. 604; *State v. Fuller*, 34 N. J. Law, 227; *Sloan v. Beebe*, 24 Kan. 343; *Lufkin v. Galveston*, 58 Tex. 545.

⁵ *Allen v. Drew*, 44 Vt. 174; *Allentown v. Henry*, 73 Pa. St. 404; *Northern Liberties v. Swain*, 13 Pa. St. 113; *Provident Inst. v. Jersey City*, 113 U. S. 506. A statute provided for the construction of a system of water-works and that the commissioners should establish a scale of rents to be called "water rents" and appropriated to different classes of buildings in reference to their dimensions, exposure to fire, etc. It was contended that the term "rents" implied the necessity of actual use by the property owner in order to create a liability or confer power upon the com-

⁶ *Cooley on Taxation* (2d ed.), 621; *Jonas v. Cincinnati*, 18 Ohio St. 318; *Creighton v. Scott*, 14 Ohio St. 438.

§ 1172. **Assessable property — Statutory exemptions.**— The fundamental distinction between taxation and special assessments is applied in construing statutory exemptions from taxation, and the courts are firmly committed to the doctrine that special assessments are not included within the meaning of the word "taxation." Thus, while the State may not authorize corporate authorities to levy special assessments upon property of the United States, as it would be an invasion of the rights of a distinct sovereignty, no such reason exists as between the several agencies of the State government which are subject to its control and direction, and a county may be compelled to pay a special assessment against its court-house for local improvements, although public property be exempt from taxation by express statute.¹

§ 1173. **Statutory exemptions continued.**— The same rule applies to exemptions of burying grounds from taxation,²

missioners. But the court held that the protection in case of fire was sufficient benefit though no water was taken or used in the building. *Dasey v. Skinner*, 11 N. Y. Supl. 821. See, also, to the same point, *Warren v. City of Chicago*, 118 Ill. 329; s. c., 9 N. E. Rep. 218.

¹ *County of McLean v. City of Bloomington* (1883), 106 Ill. 209, followed in *County of Adams v. City of Quincy* (1889), 130 Ill. 566, holding, however, that the property could not be sold without express authority, and that the remedy was by *mandamus*, after judgment at law, to compel payment of the charge. In *Luna v. Cemetery Ass'n*, 42 Ohio St. 128, it was held that, authority to assess being shown, whoever insists that his property is exempt from the burden will be required to support his claim by a provision equally clear; and although cemetery property was exempted from taxation and from sale under any legal process whatever, nevertheless payment could be secured by the appointment of a re-

ceiver, by sequestration, or by such other appropriate remedy as equity may afford. See, also, *Louisville v. Nevin*, 10 Bush (Ky.), 549; s. c., 19 Am. Rep. 78; and as to the effect of exemption from sale on execution, *Bloomington Cemetery Ass'n v. People* (Ill., 1891), 28 N. E. Rep. 1076. But in *Lowe v. Comm'rs of Howard County* (1883), 94 Ind. 553, 554, it was held that under a general authority no assessment could be made against a public square of a county, *Elliott, J.*, saying that "while an assessment for improving a street is not in a strict sense a tax, yet it so far partakes of the nature of a tax as makes it operative only upon property subject to taxation;" reiterated in substantially the same language in *Elliott on Roads and Streets*, 403. See, also, *Worcester County v. Worcester*, 116 Mass. 193.

² *Lima v. Cemetery Ass'n*, 42 Ohio St. 158; *Louisville v. Nevin*, 10 Bush (Ky.), 549. Under similar provisions such is the holding in New York: *Buffalo City Cemetery v. Buffalo*, 46

charitable institutions,¹ church real estate,² educational institutions and their real estate,³ and public school property.⁴ But

N. Y. 503, 506, cited in *Roosevelt Hospital v. Mayor*, 84 N. Y. 108, 115; *People v. Davenport*, 91 N. Y. 574, 586. In Maryland: *Alexander v. Baltimore*, 5 Gill, 396; *Baltimore v. Greenmount Cemetery*, 7 Md. 517. In Missouri: *Lockwood v. St. Louis*, 24 Mo. 20; *St. Louis Public Schools v. St. Louis*, 26 Mo. 468; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; s. c., 11 Am. Rep. 412. In Ohio: *Armstrong v. Athens County*, 10 Ohio, 235; *Cincinnati College v. State*, 19 Ohio, 110; *North Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Kendrick v. Farquhar*, 8 Ohio, 189; *Cleveland Library Ass'n v. Pelton*, 36 Ohio St. 253; *Price v. Methodist Church*, 4 Ohio, 512; *Hullman v. Honcomp*, 5 Ohio St. 237. In Louisiana: *Crowley v. Copley*, 2 La. Ann. 329; *Lafayette v. Male Orphan Asylum*, 4 La. Ann. 1; *Yeatman v. Crandall*, 11 La. Ann. 220; *Rooney v. Brown*, 21 La. Ann. 51. In Indiana: *Palmer v. Stump*, 29 Ind. 329; *First Presb't'n Church v. Fort Wayne*, 36 Ind. 338; *Marks v. Trustees*, 37 Ind. 155. In Illinois: *County of Adams v. City of Quincy* (1889), 130 Ill. 566; *Bloomington Cemetery Ass'n v. People* (Ill., 1891), 28 N. E. Rep. 1076 (the last two cases are cited in the preceding section); *Illinois & M. Canal v. Chicago*, 12 Ill. 403; *Peoria v. Kidder*, 26 Ill. 351; *Pleasant v. Kost*, 29 Ill. 490; *People v. Graceland Cemetery Co.*, 83 Ill. 336. In Iowa: *Sioux City v. School District*, 55 Iowa, 150. In Michigan: *Leefevre v. Detroit*, 2 Mich. 586. In Kentucky: *Broadway Bapt. Church v. McAtee*, 8 Bush, 508. In Kansas: *Paine v. Spratley*, 5 Kan. 525. In Connecticut: *Bridgeport v. Railroad Co.*, 36 Conn. 255. In California: *Emery v. Gas Co.*, 28 Cal.

345; *Reclamation Dist. v. Goldman*, 61 Cal. 205. In Rhode Island: *Second Univ. Soc. v. Providence*, 6 R. I. 235; *Matter of College Street*, 8 R. I. 476; *Beals v. Rubber Co.*, 11 R. I. 381; s. c., 23 Am. Rep. 472. In Virginia: *Orange & C. R. Co. v. Alexandria*, 17 Gratt. 176. In Pennsylvania: *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Pray v. Northern Liberties*, 31 Pa. St. 69; *Greensburg v. Young*, 53 Pa. St. 219; *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129. In New Jersey: *Paterson v. Society & c.*, 24 N. J. Law, 385; *State v. Newark*, 27 N. J. Law, 185; *State v. Newark*, 35 N. J. Law, 157. (*Hoboken v. North Bergen*, 43 N. J. Law, 146, is consistent with the preceding cases.) In Massachusetts: *Boston & c. Society v. Boston*, 116 Mass. 181; s. c., 17 Am. Rep. 153. *Contra*, *Hale v. Kenosha*, 29 Wis. 599; *Dalrymple v. Milwaukee*, 53 Wis. 178.

¹ "Exempted from taxation of every kind" was the language of the statute. *Sheehan v. Hospital*, 50 Mo. 155. "From all taxes either by State, parish or city." *Lafayette v. Asylum*, 4 La. Ann. 1. "From all taxation by State or local laws for any purpose whatever." *Zabel v. Louisville Baptist Orphans' Home* (Ky., 1891), 17 S. W. Rep. 212.

² *City of Atlanta v. Church* (1890), 86 Ga. 730, overruling *Trustees v. City of Atlanta*, 76 Ga. 181, and s. c., 83 Ga. 448; *In re Mayor of New York*, 11 Johns. 77; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Boston & c. Society v. Boston*, 116 Mass. 181. See, also, *City of Philadelphia v. Contributors & c.* (Pa.), 22 Atl. Rep. 744.

³ *In re College Street*, 8 R. I. 474.

⁴ *St. Louis Pub. Schools v. City of*

an exemption from all "assessments and taxes whatever by the city," etc.,¹ or from all "civil impositions," taxes and rates,² is an effectual protection.

§ 1174. Assessments against railroad companies.— The decisions are not entirely harmonious in regard to the legality of assessments upon railroad companies or their property for local improvements. It was held in New Jersey that a steam railroad company was not assessable for the expense of widening a street on which its tracks were laid,³ and that the road-bed of a horse railroad company could not be benefited by improving the grade of the highway,⁴ but that the road-bed of a steam railroad company running through the center of a street might be assessed for benefits resulting from the building of a sewer.⁵ Authority to assess "property" benefited will sustain an assessment for paving upon the rails, sleepers, ties and spikes of a street railway company,⁶ but "land and

St. Louis, 26 Mo. 468; *Lockwood v. St. Louis*, 24 Mo. 20. *Contra*, *Board of Imp. v. School Dist.* (Ark., 1892), 19 S. W. Rep. 969, where the subject is thoroughly discussed; *City of Toledo v. Board of Education* (1891), 48 Ohio St. 83. And in *City of Hartford v. West Middle District*, 45 Conn. 462, it was held that school-house grounds could not be benefited by laying out a street.

¹ *St. Paul &c. R. Co. v. City of St. Paul*, 21 Minn. 526.

² *Harvard College v. Boston*, 104 Mass. 470.

³ *State v. Newark*, 27 N. J. Law, 185, on the ground that the benefit was one common to the public and not special.

⁴ *Davis v. City of Newark* (N. J., 1892), 23 Atl. Rep. 276. "Such a benefit," said the court, ". . . is conferred upon the franchise and not upon the strip of land on which the cars run. The land, burdened with the public easement, would in no respect be increased in value thereby." The assessment contemplated by the

statute was only upon real estate. *Matter of Comm'rs of Public Parks*, 47 Hun, 302. See, also, *King v. Duryea*, 45 N. J. Law, 258; *City of Bloomington v. Chicago &c. R. Co.* (1890), 134 Ill. 451. *Contra*, *Appeal of North Beach &c. R. Co.*, 32 Cal. 499, where a distinction is drawn between horse and steam railroads in respect of benefits in such cases. See, also, *Railroad Co. v. Connelly*, 10 Ohio St. 159; *Railroad Co. v. Wright*, 5 R. I. 459; *Chicago v. Baer*, 41 Ill. 306; *Railroad Co. v. City of Chicago*, 90 Ill. 573; *Parmerlee v. Chicago*, 60 Ill. 267.

⁵ *State v. City of Passaic* (N. J., 1892), 23 Atl. Rep. 945.

⁶ *New Haven v. Fairhaven &c. R. Co.*, 38 Conn. 422. But *People v. Gilon*, 126 N. Y. 147, holds that the fact that the rails, ties and tracks of a street surface railroad are property and subject to taxation generally affords no sufficient reason for taxing them for street improvements, when the law has not made them specially assessable for such purposes. "It

buildings" would not include the franchise of the corporation.¹ It has been declared to be a conclusive presumption of law that the road-bed of a (steam) railroad company can derive no possible benefit from the improvement of a street contiguous to it, and that the legislature is powerless to authorize an assessment upon it.² But depots and depot grounds and other lands specially benefited are unquestionably subject to municipal assessments.³

§ 1175. **Assessment districts.**—The legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion;⁴ and when it determines what lands which might be benefited by the improvement are in fact benefited, its determination is conclusive upon the owners and the courts.⁵

cannot be said as a matter of course that street railroads are benefited by a pavement of the streets through which they are laid."

¹ *Farmers' Loan & Trust Co. v. Borough of Ansonia* (1891), 61 Conn. 76.

² *City of Allegheny v. Western Penn. R. Co.* (Pa., 1891), 21 Atl. Rep. 762; *Philadelphia v. Railroad Co.*, 33 Pa. St. 41. A railroad company whose only interest in a certain track is the right by contract to run its trains over the track has no such title thereto as can be subjected to special assessment for a local improvement. *Louisville &c. R. Co. v. City of East St. Louis* (1891), 134 Ill. 656. Where the assessment is authorized upon property abutting on a street, the right of way of a railroad company across the street is not assessable. *Chicago &c. R. Co. v. South Park Comm'rs*, 11 Ill. App. 562; *South Park Comm'rs v. Railroad Co.*, 107

Ill. 105. Cf. *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 159.

³ *Borough of Mt. Pleasant v. Baltimore &c. R. Co.* (Pa.), 20 Atl. Rep. 1052 (sidewalk); *Chicago &c. R. Co. v. City of Chicago* (Ill., 1891), 29 N. E. Rep. 1109; *In re Alexander Ave.*, 17 N. Y. Supl. 933; *Ludlow v. Trustees*, 78 Ky. 357; *Chicago &c. R. Co. v. People*, 120 Ill. 104. See, also, *In re County of Hampshire*, 143 Mass. 424.

⁴ Mr. Justice Gray in *Spencer v. Merchant*, 125 U. S. 345, 355; *Willard v. Presbury*, 14 Wall. 676; *Davidson v. New Orleans*, 96 U. S. 97; *Mobile County v. Kimball*, 102 U. S. 691; *Hagar v. Reclamation District*, 111 U. S. 701.

⁵ *Spencer v. Merchant*, 125 U. S. 345, 356. "In no part of the law of taxation has the practice of our State governments left the discretion of the legislature more entirely unfettered than in laying and apportioning such assessments, and the

§ 1176. **The same subject continued.**—The legislature, in the absence of constitutional prohibition, may delegate to the local authorities the power to establish the districts upon which the assessments shall be levied, and the rule as stated in the preceding section applies here, that their decision in the matter is conclusive.¹ But whether the legislature or the municipal authorities fix the district, there are many cases which hold that the power is subject to limitations; that if the property is so situated as to render it physically impossible for the improvement to benefit it, or the discretion is exercised so as to leave no public character whatever to the dis-

case must be most extraordinary and clearly exceptional to warrant any court in declaring that the discretion has been abused and the legislative authority exceeded." Cooley on Taxation (2d ed.), 145; *People v. Brooklyn*, 4 N. Y. 419, the leading case; *McFerron v. Alloway*, 14 Bush (Ky.), 580; *Shaw v. Dennis*, 10 Ill. 405; *Michener v. Philadelphia*, 118 Pa. St. 535; *Litchfield v. Vernon*, 41 N. Y. 123; *Philadelphia v. Field*, 58 Pa. St. 320; *Macon v. Patty*, 57 Miss. 378; *Langhorne v. Robinson*, 20 Gratt. 661; *Kelley v. Cleveland*, 34 Ohio St. 468; *Hoyt v. East Saginaw*, 19 Mich. 39; *Bigelow v. Chicago*, 90 Ill. 49; *Kingman & c.*, *Petitioners*, 153 Mass. 566; s. c., 27 N. E. Rep. 779; *Nevin v. Roach*, 86 Ky. 492; *Meggett v. City of Eau Claire* (Wis., 1892), 51 N. W. Rep. 566; *City of Harrisburg v. McCormick*, 129 Pa. St. 213; *Chester City v. Black*, 132 Pa. St. 570; *City of St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677; *Conwell v. Connersville*, 8 Ind. 358; *People v. Supervisors &c.*, 20 N. Y. 252, 255; *Malchus v. Highlands*, 4 Bush, 547; *Waterville v. Kennebec Co.*, 59 Me. 80; *Challis v. Parker*, 11 Kan. 394; *People v. Lawrence*, 41 N. Y. 137; *Hingham &c. Turnpike v. Norfolk County*, 6 Allen, 353; *Parker v. Challis*, 9 Kan. 155; *Baltimore v. Hughes*, 1 Gill & J. 480;

Gordon v. Carnes, 47 N. Y. 608; *St. Louis v. Oeters*, 36 Mo. 458; *Arnold v. Cambridge*, 106 Mass. 352; *Cumming v. Grand Rapids*, 46 Mich. 150; *Scovill v. Cleveland*, 1 Ohio St. 126; *Hines v. Leavenworth*, 3 Kan. 186; *Terry v. Hartford*, 39 Conn. 291; *Cody v. Fort Wayne*, 48 Ind. 197; *Warren v. Henly*, 31 Iowa, 31; *Hill v. Higdon*, 5 Ohio St. 243; *Williams v. Detroit*, 2 Mich. 560; *Motz v. City*, 18 Mich. 495; *Halsey v. People*, 84 Ill. 89; *Wright v. People*, 87 Ill. 582; *Cook v. Slocum*, 27 Minn. 509; *Brown v. Denver*, 3 Colo. 169; *Burnett v. Sacramento*, 12 Cal. 76; *Commonwealth v. Woods*, 44 Pa. St. 113; *Whiting v. Townsend*, 57 Cal. 515; *Petition of Brady*, 85 N. Y. 268; *Ludlow v. Trustees*, 78 Ky. 357; *In re Bassford*, 50 N. Y. 509; *Joseph v. O'Donoghue*, 31 Mo. 345; *Rogers v. St. Paul*, 22 Minn. 494; *Ex parte Mayor*, 23 Wend. 277. As to what property is "adjoining the locality to be affected" within a constitutional provision, see *City of Little Rock v. Katzenstein*, 52 Ark. 107.

¹ *Elliott on Roads and Streets*, 395; *Cooley on Taxation* (2d ed.), 640; *Rogers v. St. Paul*, 22 Minn. 494; *Tecgarden v. Racine*, 56 Wis. 545; *Meggett v. City of Eau Claire* (Wis., 1892), 51 N. W. Rep. 566.

trict, or if it clearly appears that there is no benefit which the property did not before possess, the assessment will be set aside.¹

§ 1177. Prescribed formalities must be strictly followed. In order to charge the owners of property with the cost of an improvement, the power must not only be expressly conferred by law, but the provisions of the law must be strictly pursued. The successive steps to be taken preliminary to ordering the work done, the manner of letting the contract and the mode of constructing the improvement, when provided for in the law, are intended for the protection of the property owner and are his safeguards against the exercise of arbitrary power. Each act required to be done is essential to the exercise of the jurisdiction and each must be rigidly pursued. The courts cannot say that the omission of some requirement is unimportant or that an act different from that directed is substantially as good. The effect of the proceeding being to charge the property of the citizen with a burden for the public benefit, the requirements of the law as to the exercise of the power should be deemed mandatory.²

¹In *Edwards v. City of Chicago* (Ill., 1892), 30 N. E. Rep. 350, it was contended that an assessment for an underground sewer upon all lands within a given district was valid, because the commissioners had found that they would be benefited by the improvement. But the court held that this clearly could not be imposed on lands which could not be connected with the sewer, or unless some provision for such connection was made in the ordinance. *State v. Mayor &c.* (N. J., 1891), 21 Atl. Rep. 453, a similar case; *City of Bloomington v. Chicago &c. R. Co.* (1890), 134 Ill. 451; *Speer v. City of Athens*, 85 Ga. 49; s. c., 11 S. E. Rep. 802; *Paulson v. City of Portland*, 16 Oregon, 450; *State v. City of Newark* (N. J.), 12 Atl. Rep. 770; *City of Detroit v. Daly*, 68 Mich. 503; *Preston v. Roberts*, 12 Bush (Ky.), 570; *Keith v. Bingham*

100 Mo. 300; *Hanscom v. City of Omaha*, 11 Neb. 37. "In the absence of fraud, oppression or manifest mistake such determinations are conclusive." *Davies v. City of Saginaw* (Mich., 1891), 49 N. W. Rep. 667; *Thomas v. Gain*, 35 Mich. 155, a leading case, affirming the right of the judiciary to pronounce an arbitrary determination invalid. See, also, *In re Washington Ave.*, 69 Pa. St. 352; *Craig v. Philadelphia*, 89 Pa. St. 265; *Seely v. Pittsburgh*, 82 Pa. St. 360.

²*Flewellen v. Proetzel* (Tex., 1891), 15 S. W. Rep. 1043; *Worthington v. Covington*, 82 Ky. 265; *Murphy v. Louisville*, 9 Bush (Ky.), 189; *City of Spokane Falls v. Browne* (Wash.), 27 Pac. Rep. 1077; *Allen v. Galveston*, 51 Tex. 302; *Savage v. City of Buffalo*, 14 N. Y. Supl. 101; *Brophy v. Landman*, 28 Ohio St. 542; *Lowell v. Wheelock*, 11 Cush. 391; *Chicago v.*

§ 1178. The same subject continued.—Thus, where the charter requires notice of intention to order an assessment, such notice is essential to its validity.¹ So, also, where pre-

Wright, 32 Ill. 192; *City of St. Louis v. Rankin*, 96 Mo. 497; *Sewall v. St. Paul*, 20 Minn. 511; *In re Manhattan R. Co.*, 102 N. Y. 301; *Ziegler v. Flack*, 54 N. Y. Super. Ct. 69; *Newman v. City*, 32 Kan. 456; *Lyon v. Alley*, 130 U. S. 177; *State v. Bayonne*, 49 N. J. Law, 311. "The mode in such cases constitutes the measure of the power." Field, C. J., in *Zottman v. San Francisco*, 20 Cal. 102; *D'Antignac v. Augusta*, 31 Ga. 700; *Lexington v. Headley*, 5 Bush (Ky.), 508; *Lott v. Ross*, 38 Ala. 156; *Welker v. Potter*, 18 Ohio St. 85; *Fitch v. Pinckard*, 5 Ill. 78; *Hawthorne v. East Portland*, 13 Oregon, 271; *Henderson v. Baltimore*, 8 Md. 352; *White v. Stevens*, 67 Mich. 33; s. c., 34 N. W. Rep. 255; *Rathbun v. Acker*, 18 Barb. 393; *Ranch v. City*, 32 Kan. 456; *Crane v. Janesville*, 20 Wis. 305; *Hurford v. Omaha*, 4 Neb. 336; *Knox v. Peterson*, 21 Wis. 247; *State v. Passaic*, 41 N. J. Law, 90; *Collins v. Louisville*, 2 B. Mon. (Ky.) 134; *Merrill v. Abbott*, 62 Ind. 549; *State v. Hudson*, 29 N. J. Law, 104; *Cross v. Morristown*, 18 N. J. Eq. 305; *Whalen v. La Crosse*, 16 Wis. 270; *State v. Crawford*, 36 N. J. Law, 394; *Finney v. Oshkosh*, 18 Wis. 220; *State v. Perth Amboy*, 38 N. J. Law, 425; *Fletcher v. Oshkosh*, 18 Wis. 229; *Benton v. Milwaukee*, 50 Wis. 368; *Leach v. Cargill*, 60 Mo. 316; *Butler v. Nevin*, 88 Ill. 575; *Hummelman v. Danos*, 32 Cal. 441; *Churchman v. Indianapolis*, 110 Ind. 259; *Dougherty v. Hitchcock*, 35 Cal. 512; *Frost v. Leatherman*, 55 Mich. 33; *Hall v. Chippewa Falls*, 47 Wis. 267, followed in *Drummond v. City of Eau Claire* (Wis.), 48 N. W. Rep. 244; *State v. Babcock*, 20 Neb. 522; *Eilert*

v. Oshkosh, 14 Wis. 587; *Green v. Ward*, 83 Va. 324; *Smith v. Milwaukee*, 18 Wis. 63; *Fort Smith v. Davis*, 57 Tex. 225; *Bouldin v. Baltimore*, 15 Md. 18; *In re Eager*, 46 N. Y. 100; *Columbus v. Story*, 35 Ind. 97; *Hewes v. Reis*, 40 Cal. 255; *Massing v. Ames*, 37 Wis. 645; *Fulton v. Lincoln*, 9 Neb. 358; *Pond v. Chippewa County*, 43 Wis. 63; *Starr v. Burlington*, 45 Iowa, 87; *Merritt v. Portchester*, 71 N. Y. 309; *People v. Maher*, 56 Hun, 81; *Elliott on Roads and Streets*, 372; 1 *Desty on Taxation*, § 106; 2 *Dillon on Munic. Corp.* (4th ed.), § 769. That minor provisions will sometimes be deemed directory, or a substantial compliance sufficient, see *Gearhart v. Dixon*, 1 Pa. St. 224; *Parish v. Golden*, 35 N. Y. 464; *State v. South Orange*, 49 N. J. Law, 104; *Stebbins v. Kay*, 4 N. Y. Supl. 566; *Strauss v. Cincinnati*, 23 *Weekly Law Bul.* 359; *Jenkins v. Stetler*, 118 Ind. 275. Directory constructions deprecated in *Elliott on Roads and Streets*, 373. In *Flewellen v. Proetzel* (Tex., 1891), 15 S. W. Rep. 1043, it is said that, after an improvement has been regularly made, it may be doubted whether a more liberal rule should not be extended to the acts which are subsequently to be performed in order to perfect the remedy of the contractor for the collection of his debt. See, also, *Davies v. City of Saginaw* (Mich.), 49 N. W. Rep. 667; *Newell v. Cincinnati* (Ohio), 15 N. E. Rep. 196.

¹ *Tift v. City of Buffalo*, 7 N. Y. Supl. 633; *Fayssoux v. De Chaurand*, 36 La. Ann. 547. See, also, *Welker v. Potter*, 18 Ohio St. 85; *Smith v. City of Toledo*, 24 Ohio St. 126.

liminary estimates or surveys are required, these are regarded as conditions precedent to an assessment.¹ And where the charter provided "that whenever the common council shall determine that it is necessary to construct" a sewer, they shall cause plans and specifications to be made and filed, and bids are then to be advertised for, it was held that an assessment for the construction of a sewer the necessity for which had not been previously determined upon by the common council was invalid.²

§ 1179. Ordinance or resolution.—The proper municipal body may, in the absence of a statutory or charter provision requiring an ordinance, initiate proceedings by order or resolution.³ But where the statute provided that "cities are authorized and empowered to enact ordinances," etc., it was held that taxes levied for street improvements simply under a resolution of the city council were invalid, and could not be validated by a subsequent ordinance.⁴ The ordinance must

¹ *Brady v. King*, 53 Cal. 44; *In re Garvey*, 77 N. Y. 523; *Frosh v. Galveston* (Tex.), 11 S. W. Rep. 402; *Dyer v. Heydenfeldt* (Cal., 1834), 4 West. Coast Rep. 585. See, also, *Mattingly v. City*, 100 Ind. 545; *City v. Fox*, 78 Ind. 1.

² *White v. Stevens*, 67 Mich. 33; s. c., 34 N. W. Rep. 255. See, also, *Hoyt v. City of Saginaw*, 19 Mich. 39. *Cf. Beecher v. City of Detroit* (Mich., 1892), 52 N. W. Rep. 731; *City of Raleigh v. Peace*, 110 N. C. 32; s. c., 14 S. E. Rep. 521. A declaration of the necessity does not involve the enumeration of details. *Davies v. City of Saginaw* (Mich., 1891), 49 N. W. Rep. 666. See, also, *Young v. St. Louis*, 47 Mo. 492; *Stuyvesant v. Mayor &c.*, 7 Cowen, 588; *Jackson v. State*, 104 Ind. 516; *Fisher v. Vaughan*, 10 Upper Can. Q. B. 492. Omissions in the preliminary steps which are mere matters of form will not vitiate the assessment. *Knell v. City of Buffalo*, 7 N. Y. S. 233. See, also, *Illinois Cent. R. Co. v. Decatur*, 126 Ill. 92; *Wood v. Strother*, 76 Cal. 545.

An assessment for grading an alleged street which has never been laid out, opened or in any way made a public highway by competent authority is illegal. *Copcutt v. City of Yonkers*, 13 N. Y. Supl. 452. See, also, *City of Philadelphia v. Ball* (Pa.), 23 Atl. Rep. 564. But it was held in *Maywood Co. v. Village of Maywood* (Ill.), 29 N. E. Rep. 704 (following *Village of Hyde Park v. Borden*, 94 Ill. 26), that an ordinance for the construction of a sewer by special assessment may be passed before title to the land to be taken for the sewer has been acquired.

³ *Moberry v. Jeffersonville*, 38 Ind. 198; *Harney v. Heller*, 47 Cal. 17; *Emery v. San Francisco*, 28 Cal. 375.

⁴ *Newman v. Emporia*, 32 Kan. 456. See, also, *Barron v. Krebs*, 41 Kan. 338; *City of Scranton v. Barnes* (Pa.), 23 Atl. Rep. 777; *Elliott on Roads and Streets*, 380. The law in force at the time of the passage of the ordinance should govern the manner of assessment and rights and liabilities of

be enacted in the mode prescribed by law: If the concurrence of more than a majority of the members of a board is required, an assessment for improvements undertaken in accordance with a vote passed by less than the number specified cannot be enforced.¹ The same rule was applied where the resolution was not submitted to the mayor for his approval in compliance with the provisions of the charter.²

§ 1180. *Petition.*—Unless the statute so requires, a petition by property owners is not a necessary preliminary to the institution of the proceedings.³ But where a petition of a certain number or proportion of the owners of property is necessary to set the machinery of the statute authorizing the improvement in motion, a petition meeting all the requirements is an indispensable prerequisite to the jurisdiction of the municipal authorities.⁴ One whose land is sold for non-

owners. *City of Cincinnati v. Season-good*, 46 Ohio St. 296; s. c., 21 N. E. Rep. 630.

¹ *Town of Albuquerque v. Zeiger* (N. M.), 27 Pac. Rep. 315; *Wood v. City of Galveston*, 76 Tex. 126, holding the petition to collect the assessment insufficient to support a judgment by default, for failure to allege that the vote was passed by two-thirds as there required. *Price v. Railroad Co.*, 13 Ind. 58; *Logansport v. Legg*, 20 Ind. 315; *Chamberlain v. Cleveland*, 34 Ohio St. 55; *Petition of De Pierris*, 82 N. Y. 243; *Danville v. Shelton*, 76 Va. 325; *Matter of the Metropolitan Gas Light Co.*, 85 N. Y. 526. See, also, *Holt v. Somerville*, 127 Mass. 408; and as to quorums and majorities, ch. IX, vol. I, on PUBLIC BOARDS.

² *Twiss v. Port Huron*, 63 Mich. 528. See, also, as to requirements of several readings of an ordinance, *State v. Newark*, 30 N. J. Law, 303; *Weill v. Kenfield*, 54 Cal. 111; *Cutcomb v. Utt*, 60 Iowa, 156. Cf. *Barton v. Pittsburgh*, 4 Brews. 373. It sufficiently appears that the proceedings of a council in referring a petition for

street improvement were presented to the mayor for approval, when it is shown that the documents were given to the mayor's clerk, who, in accordance with his custom, was at the office to receive such papers, and that the mayor afterwards attempted to approve them. *Knell v. City of Buffalo*, 7 N. Y. Supl. 233. "There is some conflict in the authorities as to when the provisions of a statute concerning the adoption of ordinances shall be considered mandatory and when directory, but we believe the only safe rule in assessment cases is to consider all such provisions mandatory unless there is an exceedingly strong reason for holding them to be directory." *Elliott on Roads and Streets*, 389, n. 5, and case cited.

³ *Farrar v. St. Louis*, 80 Mo. 379; *Dennison v. Kansas City*, 95 Mo. 416; *Barber Asphalt Paving Co. v. Go-greve*, 41 La. Ann. 251; s. c., 5 So. Rep. 848.

⁴ *Zeigler v. Hopkins*, 117 U. S. 683, holding that if the requisite number do not apply the whole proceedings are null and void. *Holland v. Baltimore*, 11 Md. 186; *Baltimore v. Esch-*

payment of an assessment for benefits may show, in ejectment to recover back the land, that the petition was not signed by the requisite majority although the improvement was ordered on the basis of the petition as presented.¹

§ 1181. **The same subject continued.**—But a special assessment, invalid only for the insufficiency of the petition and of the number of signatures thereto required, may be cured by an act of the legislature;² and it has been held that slight changes and modifications may be made in the course of the work without a petition therefor, where it does not appear that such changes increase the cost.³ The petitioners are not

bach, 18 Md. 276; *Miller v. Mobile*, 47 Ala. 163; *People v. Rochester*, 21 Barb. 656; *In re Sharp*, 56 N. Y. 257; *People v. Brooklyn*, 71 N. Y. 495; *In re Kiernan*, 62 N. Y. 457; *Boyle v. Brooklyn*, 71 N. Y. 495; *Zimmerman v. Snouden*, 88 Mo. 218; *Jefferson County v. Cowan*, 54 Mo. 234; *Thorn v. West Chicago Park Comm'rs*, 130 Ill. 594; s. c., 22 N. E. Rep. 520; *State v. Nelson*, 57 Wis. 147; *Wells v. Burnham*, 20 Wis. 112; *Town of Albuquerque v. Zeiger* (N. M.), 27 Pac. Rep. 315; *State v. Orange*, 32 N. J. Law, 49; *Carron v. Martin*, 26 N. J. Law, 594; *State v. Hand*, 31 N. J. Law, 547; *State v. Newark*, 37 N. J. Law, 415 (reversing s. c., 35 N. J. Law, 168); *Camden v. Mulford*, 26 N. J. Law, 49; *State v. Elizabeth*, 37 N. J. Law, 432; *In re Royal St.*, 16 La. Ann. 393; *Daniel v. New Orleans*, 26 La. Ann. 1; *McGuinn v. Peri*, 16 La. Ann. 326; *McKee v. Brown*, 23 La. 306; *Lexington v. Headley*, 5 Bush (Ky.), 508; *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177. A board being authorized to make assessments on a petition of two-thirds of the owners of adjoining lots, or without a petition by a two-thirds vote of the board, the fact that there was an insufficient petition will not avoid assessments made by a two-thirds vote. *McEneney v. Town of*

Sullivan, 125 Ind. 407; s. c., 25 N. E. Rep. 540. But in such a case either one or the other of the conditions must be complied with. *Covington v. Casey*, 3 Bush (Ky.), 698; *Tallant v. Burlington*, 39 Iowa, 543; *Mulligan v. Smith*, 59 Cal. 206; *Burnett v. Sacramento*, 12 Cal. 76; *Turrill v. Grattan*, 52 Cal. 97; *Welsford v. Weidlein*, 23 Kan. 601; *Shaffer v. Weech*, 34 Kan. 595; *Miller v. Mobile*, 47 Ala. 163; *James v. Pine Bluff*, 49 Ark. 199; *Kyle v. Malin*, 8 Ind. 34; *Moberry v. Jeffersonville*, 38 Ind. 198; *Forsyth v. Kreuter*, 100 Ind. 27; *Delphi v. Evans*, 36 Ind. 90; *Hager v. Burlington*, 42 Iowa, 661; *Henry v. Thomas*, 119 Mass. 583; *Maguire v. Smock*, 42 Ind. 1 (signatures obtained by bribery). See, also, *Dennison v. Kansas City*, 95 Mo. 416; *Meyer v. Fromm*, 108 Ind. 208.

¹ *Zeigler v. Hopkins*, 117 U. S. 683. Cf. *In re Michie &c.*, 11 Up. Can. C. P. 379; *Wright v. Tacoma*, 3 Wash. T. 410.

² *People v. Wilson*, 3 N. Y. Supl. 326; *Whitney v. City of Pittsburgh* (Pa.), 23 Atl. Rep. 395; *Bingaman v. City of Pittsburgh* (Pa.), 23 Atl. Rep. 395.

³ *O'Reilly v. Kingston*, 114 N. Y. 439; s. c., 21 N. E. Rep. 1004. Under the charter of Kansas City (Acts Mo. 1875, p. 250), which provides that

estopped to deny the validity of the tax levy on the ground that the statute was not complied with in making the improvement.¹

§ 1182. Description of improvement.—It is frequently provided that the ordinance shall set out the nature, character, locality, description, etc., of the improvement.² Upon the principle that *id certum est quod certum reddi potest*, ordinances have been upheld which, though insufficient and incomplete in themselves, referred to specifications on file in a public office or to maps or other accessible data for a more particular description.³ And an assessment for a street improvement was sustained, although the resolution deciding to

streets shall not be improved at the expense of property holders thereon until a majority of them, in front feet, petition for it, after which such petition shall be published, and persons liable for the expense of the proposed improvement may make objections which the council shall hear and decide, and that when the ordinance for such improvement declares that the requirements as to petition and notice have been complied with, such declaration shall be conclusive for all purposes, if the council refuse a hearing when demanded, to interested persons making objections, the execution of the ordinance will be restrained until such hearing is had. *Dennison v. City of Kansas City*, 95 Mo. 416; s. c., 8 S. W. Rep. 429. That the legislature may make the determination of the council conclusive, see *Dolan v. New York*, 62 N. Y. 472; *In re Kiernan*, 62 N. Y. 457. Petition need not follow the statute literally. *Wahlgreen v. Kansas City*, 42 Kan. 243.

¹ *McLauren v. City of Grand Forks*, 6 Dak. 397; s. c., 43 N. W. Rep. 710. Cf. *Burlington v. Gilbert*, 31 Iowa, 356.

² Ordinance fatal because of an insufficient description of the "exterior boundaries" of the district to be as-

sessed. *Dehail v. Morford* (Cal.), 30 Pac. Rep. 593. Ordinance for a brick sewer "with necessary man-holes" is not defective because of failure to specify the location of the man-holes. *City of Springfield v. Sale*, 127 Ill. 359, following *City of Springfield v. Mathus* (Ill.), 16 N. E. Rep. 92. See, also, *Pearce v. Village of Hyde Park*, 136 Ill. 287; *Faber v. Grafmiller*, 109 Ind. 206; *Ross v. Stackhouse*, 114 Ind. 200; *Main v. Fort Smith*, 49 Ark. 480; s. c., 5 S. W. Rep. 801; *Village of Hyde Park v. Carton*, 132 Ill. 100; s. c., 23 N. E. Rep. 590 (insufficient description. See, also, *Ogden v. Town of Lake View*, 121 Ill. 422); *Doane v. Houghton*, 75 Cal. 360; *Blair v. Lunning*, 76 Cal. 134.

³ *State v. Mayor*, 32 N. J. Law, 49; *Pearce v. City of Hyde Park*, 126 Ill. 287; *State v. Morristown*, 34 N. J. Law, 445; *Stone v. Cambridge*, 6 Cush. 270; *Galbreath v. Newton*, 20 Mo. App. 380; *Moran v. Lindell*, 52 Mo. 229; *Carlin v. Cavender*, 56 Mo. 288. See, also, *Kimble v. City of Peoria* (Ill.), 29 N. E. Rep. 723; *Sterling v. Galt*, 117 Ill. 17; *McChesney v. Village of Hyde Park* (Ill.), 28 N. E. Rep. 110; *Green v. City of Springfield*, 130 Ill. 515; s. c., 22 N. E. Rep. 602.

make the improvement according to plans to be prepared by the city surveyor, and calling for proposals, was adopted before the plans and specifications for the work were filed, where the plans were filed and approved before adopting the final ordinance providing for the improvement; the statute not requiring a separate approval of the plans and specifications before publishing for bids.¹

§ 1183. Delegation of matters of detail.—The authority to make improvements cannot be delegated by the municipal body to whom it is confided, but the rule does not extend to matters of mere detail,² or forbid the transaction of the business by the methods commonly used by legislative bodies. Thus, where the mayor appointed a committee to make the assessment, and the common council adopted the report of such committee, the assessment was held to be valid, as it came into existence by virtue of the creative power of the vote of the common council in adopting the report.³

§ 1184. Necessity of prescribed rule of apportionment.—The law providing for a local assessment must establish some definite scheme within constitutional limits for the apportionment of the tax upon the lands on which the special burden is imposed. Authority to a common council to assess upon certain property so much of the expense “as they shall deem just and equitable” was held to be too vague to sustain the proceeding.⁴

¹ *Gilmore v. City of Utica*, 131 N. Y. 26; s. c., 29 N. E. Rep. 841.

² *Elliott on Roads and Streets*, 381.

³ *Bartram v. City of Bridgeport*, 55 Conn. 122; s. c., 10 Atl. Rep. 470. Appointment by the board of trustees, who are authorized to make an assessment for widening a street, of a committee to prepare the assessment, consisting of two trustees and the clerk of the board, is not an unauthorized delegation of power to the clerk where the assessment prepared by the committee is reported to and passed on by the board. *People v. Lohnas*, 54 Hun, 604. See, also,

Albertson v. Town of Cicero, 129 Ill. 226; *Davies v. City of Saginaw* (Mich.), 49 N. W. Rep. 667; *Ray v. City*, 90 Ind. 567; *Hitchcock v. Galveston*, 96 U. S. 341.

⁴ *New Brunswick Rubber Co. v. Comm'rs*, 38 N. J. Law, 190; *Barnes v. Dyer*, 56 Vt. 469. In the latter case the court said:—“The only question here is whether the phrase ‘as they shall deem just and equitable’ is sufficiently certain as a standard of assessment. If it could be properly construed as meaning only what was just and equitable in view of the benefit to the premises fronting on

§ 1185. Notice — *Stuart v. Palmer*.—A leading case upon the subject of notice in assessment proceedings is *Stuart v. Palmer*, decided by the Court of Appeals of New York.¹ The facts in that case briefly stated were, that commissioners of assessment were authorized by statute to ascertain what lands were benefited by an improvement, and then to apportion and assess the cost upon such land in proportion to benefits. The assessment when made was declared to be a lien upon the land, and its payment could be enforced by a sale thereof.² No notice of any kind was provided in the law or ever made, issued, published or given to the property holders. In the course of an elaborate opinion, Earl, J., said:—"I am of opinion that the constitution sanctions no law imposing such an assessment without a notice to, and a hearing or an opportunity of a hearing by, the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of law is to be tested, not by what has

the improved sidewalk it would possibly be sufficient. The exceptions do not state upon what view or theory the assessment in question was made. If said clause is fairly liable to a different construction from the one above stated, then it furnishes no legal standard of assessment. Did the court or common council determine the amount of this assessment in view of the benefit to the abutting land or of its value, or of the personal convenience to the defendant, or of the ability of the defendant to pay, or of all these combined? . . . The words import no special limitation." *City of El Paso v. Mundy* (Tex., 1892), 20 S. W. Rep. 140, exactly in point. See, also, *Whiteford v. Probate Judge*, 53 Mich. 130. *Ferguson v. Borough of*

Stamford (1891), 60 Conn. 432, holds that in view of the uniform practice of assessing only for special benefits, a statute authorizing an assessment, though not limiting it in terms to special benefits, would be construed to contemplate only such benefits. *Raleigh v. Peace*, 110 N. C. 32, to the same effect; *Shuford v. Comm'rs*, 86 N. C. 562; *City of Pueblo v. Robinson*, 12 Colo. 593, 598.

¹ 74 N. Y. 183.

² "The assessment when once made, in the exercise of the arbitrary discretion thus conferred, would be unassailable, and, however unjust, unfair and oppressive, would be subject to no review, unless fraud or corruption could be shown." *Stuart v. Palmer*, 74 N. Y. 183, 186.

been done under it, but what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.”¹

§ 1186. The same subject continued — **Ulman v. Mayor &c.**— The city of Baltimore was authorized by statute to provide for paving streets and for assessing the cost thereof, in whole or in part, *pro rata* upon the property abutting on the street, and for collecting such assessment as other taxes were collected. The entire cost of the work, the distribution of that cost between the city and the adjoining proprietors and the establishment of a system — whether by the front-foot rule or by reference to the intrinsic value of each parcel of land abutting on the street, or by some other standard — were left by the statute to the discretion of the mayor and common council. An ordinance was passed directing a street to be paved and a certain portion of the expense to be assessed to abutting owners by the front-foot rule — “and the said tax shall be a lien upon such property.” Upon petition for an injunction to restrain the collection of the tax, the question at issue was formulated by the Court of Appeals of Maryland as follows: — “Can that discretion [in establishing the *rule* of assessment] be lawfully exercised by the municipality without notice to the individual whose property rights are directly involved?”² The court held that those rights were under

¹ *Stuart v. Palmer*, 74 N. Y. 183, 188. The provision for notice was deemed to be required in order to constitute “due process of law” within the fourteenth amendment of the federal constitution. Citing *Davidson v. New Orleans*, 96 U. S. 97. See, also, on the point that it is a federal question, *Spencer v. Merchant*, 125 U. S. 345; *Ulman v. Mayor &c.*, 72 Md. 587, 609; *Weimer v. Bruinbury*, 30 Mich. 201; *Westervelt v. Gregg*, 12 N. Y. 209; *Cooley’s Const. Lim.* 355; *Butler v. Supervisors*, 26 Mich. 22; *Patten v. Green*, 13 Cal. 325; *Philadelphia v. Muller*, 49 Pa. 440; *Matter of Trustees &c.*, 31 N. Y. 574;

Ireland v. City of Rochester, 51 Barb. 414; *Matter of Ford*, 6 Lans. (N. Y.) 92; *Barhyte v. Sheppard*, 35 N. Y. 238; *Clark v. Norton*, 49 N. Y. 243; *Overing v. Foote*, 65 N. Y. 263; *Murray’s Lessee v. Hoboken Land &c. Co.*, 18 How. 272. See, also, *Garvin v. Daussman*, 114 Ind. 429; *Fries v. Brier*, 111 Ind. 65; *Campbell v. Dwiggins*, 83 Ind. 473; *Brown v. City of Denver*, 7 Colo. 305; *Whiteford Tp. v. Probate Judge*, 53 Mich. 130.

² *Ulman v. Mayor of Baltimore* (1890), 72 Md. 587. “The first process served upon the citizen was a peremptory demand for the payment of a burdensome lien — a judgment

these conditions protected by the provisions of the Federal and State constitutions, which in substance declare that no man shall be deprived of his life, liberty or property without due process of law.¹

§ 1187. The same subject continued — **Amery v. City of Keokuk.**— An Iowa statute provided that the cost of certain street improvements might be assessed “upon the lots or parcels of ground, or any part of either of the same, fronting or lying along said street.” A city ordinance directed that the cost be charged to the lots, or parts of lots, according to the number of feet each had fronting or abutting on the street. In an action to recover from the city taxes paid for improving a street under the ordinance it appeared that the plaintiff did not own all of the lot which abutted on the street, but he was the owner of that part which bounded the street. He contended that his part of the lot was not chargeable with the whole of the tax, but that the interior part was also

in rem and *in personam* — imposed by a municipal corporation without summons or notice or warning, and without even an opportunity to appeal.”

¹ *Ulman v. Mayor &c. of Baltimore*, 72 Md. 587, returning to the doctrine laid down in *Mayor &c. v. Scharf*, 54 Md. 499, and overruling *Mayor &c. v. Scharf*, 56 Mo 50; *Mayor &c. v. Johns Hopkins Hospital*, 50 Md. 1; *Moale v. Mayor &c.*, 61 Md. 224; *Alberger v. Mayor &c.*, 64 Md. 1. In support of this ruling the court relied especially upon *Stuart v. Palmer*, 74 N. Y. 183, and *Spencer v. Merchant*, 125 U. S. 345; and also cited *Walston v. Nevin*, 128 U. S. 578; *Hagar v. Reclamation District*, 111 U. S. 701; *Davidson v. New Orleans*, 96 U. S. 97; *McMillen v. Anderson*, 95 U. S. 37; *Overing v. Foote*, 65 N. Y. 263; *City of Philadelphia v. Miller*, 49 Pa. St. 440; *Butler v. Supervisors &c.*, 26 Mich. 22; *Thomas v. Gain*, 35 Mich. 155; *Patton v. Green*, 13 Cal. 325; *Darling v. Gunn*, 50 Ill. 424; *State &c. v. Drake*,

33 N. J. Law, 194; *Cooley on Taxation*, 265. “Some cases have held,” said the court, “that where the apportionment has been made by the legislature it is final; but, without pausing to discuss this proposition, it is only necessary to say that these cases are not applicable here, for the reason that the [statute] has made no such apportionment.” Two judges dissented, contending that the remark of Mr. Justice Gray, in *Spencer v. Merchant*, *supra*, that “when the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether these lands are benefited, and how much,” did not apply. “Here,” said they, “nothing is left to the determination of the city commissioners. The ordinance . . . itself determines what property is benefited and how much,” and that the amount to be ascertained was “simply a matter of arithmetic.”

chargeable, and that he was entitled to notice of the equalization and assessment, which was not given, so that he might urge this claim. The court held it to be a case where the only act necessary to ascertain the amount of the assessment was a plain mathematical calculation, with no discretion in the city council, and that no notice was necessary.¹

§ 1188. Notice at some stage of proceedings.—If the legislature provides for notice to and bearing of each proprietor *at some stage of the proceedings* upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.²

¹ *Amery v. City of Keokuk* (1886), 72 Iowa, 701, citing *Cleveland v. Tripp*, 13 R. I. 50; *Clapp v. City of Hartford*, 35 Conn. 66; *Mayor &c. v. Johns Hopkins Hospital*, 56 Md. 1 (see the preceding section); *Hagar v. Reclamation District*, 111 U. S. 701; *Gillette v. City of Denver*, 21 Fed. Rep. 822, distinguishing *Gatch v. City of Des Moines*, 63 Iowa, 718; *Trustees &c. v. City of Davenport*, 65 Iowa, 633; *Auer v. City of Dubuque*, 65 Iowa, 650. The absence of any discretion in the city council appears by the statement of the court, that "there was no authority, under the law and ordinance, to institute an inquiry as to how far back from the street the rights of the abutting owners extended." *Amery v. City of Keokuk*, *supra*.

² *Spencer v. Merchant*, 125 U. S. 345; *McMillen v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation District*, 111 U. S. 701. "To give each property owner the right to contest every step in such an undertaking would be, in effect, to prohibit the improvement, or render its execution practically impossible in many instances. If, therefore, the law provides for giving notice, and for a method whereby the property owner may ultimately challenge the correct-

ness of the assessment made against his property, in respect to whether it was made in good faith, without intervening mistake or error, and according to the method and under the safeguards provided by law, the constitutional provision is to be deemed satisfied." *Garvin v. Daussman*, 114 Ind. 429, 436 (followed in *Law v. Johnston* (1888), 118 Ind. 261), a case where the assessment could only be enforced by foreclosure proceedings, which, of course, could only be taken in pursuance of notice. In *Davidson v. New Orleans*, 96 U. S. 97, Mr. Justice Miller said:—"Whenever by the laws of a State, or by State authority, a tax, assessment or servitude, or other burden, is imposed upon property for the public use, whether it be for the whole State, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

§ 1189. **Personal liability of land-owner.**—It is quite clear that unless the land-owner be made personally liable by statute for the amount of the assessment it can be collected only out of the property assessed.¹ But such provisions are not uncommon, and in a large number of cases their validity has been tacitly or expressly recognized.² It is contended, however, by eminent text-writers that this doctrine is opposed to the very definition of a local assessment, which is a burden imposed upon property exactly (as near as may be) commensurate with the benefit conferred, and that other property cannot be seized without violating the constitutional provision which forbids the taking of property without compensation.³ And according to the weight of judicial authority the legisla-

¹ *Green v. Ward*, 82 Va. 324, holding that authority to assess "lands" will not sustain a personal charge. *Wolf v. Philadelphia*, 105 Pa. St. 25.

² *Litchfield v. McComber*, 42 Barb. 288; *People v. Nearing*, 27 N. Y. 308; *New York v. Colgate*, 12 N. Y. 141; *Brewster v. Syracuse*, 19 N. Y. 118; *Bennett v. Buffalo*, 17 N. Y. 383; *Sharp v. Johnson*, 4 Hill, 92; *McCulloch v. Brooklyn*, 4 N. Y. 420; *In re Vacation of Center Street*, 115 Pa. St. 247; *Clemens v. Baltimore*, 16 Md. 208; *Echsbach v. Pitts*, 6 Md. 71; *Dashiell v. Baltimore*, 45 Md. 615; *Lowell v. St. Paul*, 10 Minn. 290; *Creighton v. Scott*, 14 Ohio St. 439; *Bonsall v. Lebanon*, 19 Ohio. 419; *Lowell v. French*, 6 Cush. 223; *New Orleans v. Wire*, 20 La. Ann. 500; *Burlington v. Quick*, 47 Iowa, 222; *Hazzard v. Heacock*, 39 Ind. 172. Some of the considerations in favor of this view are urged in the dissenting opinions in *Taylor v. Palmer*, 31 Cal. 240. *Sawyer, J.*, said:—"The property assessed is still the foundation upon which the assessment is based, and the rest relates to the remedy for collecting the amount which the land or the owner is liable to pay. Nor do I understand that this view would necessarily authorize the

collection of an amount greater than the real value of the property assessed. The amount for which the property actually sells under the sheriff's hammer is not conclusive of its real value. Under the rules of evidence such amount is not the measure of the value." *Shafter, J.*, said:—"It is obvious that it would be oppressive to the contractor if he could not collect assessments except by foreclosure of the lien upon the land assessed. The expenses of collecting a medley of small assessments in that way would not only be burdensome to the contractor but still more so to the lot-owner—these evils of personal consequence leading on to another of general consequence, namely, enhanced expense in making street improvements coming of the fact that bids are graduated to some extent with reference to the facility with which dues may be collected." See, also, *Litchfield v. McComber*, 42 Barb. 288, where *Brown, J.*, said:—"It is not land the government needs; it is money. The tax is assessed in money to be paid by the owner in money."

³ *Elliott on Roads and Streets*, 400; *Cooley on Taxation* (2d ed.), 674.

ture has no power to make an assessment a personal charge against the owner of the property.¹

§ 1190. Recovery of money paid on illegal assessments.—An assessment may be void for jurisdictional or constitutional reasons apparent upon its face, or it may be valid upon its face and void for matters *dehors* the record, or again it may be merely erroneous and subject to be reversed for the error or to be set aside in appropriate proceedings for that purpose. Payment of assessments may be voluntary or under coercion in fact or in law. Where the assessment is absolutely void upon its face,² and the property owner pays it without coercion in fact,³ it is deemed to be a payment under mistake of law, and he can obtain no relief.⁴

¹ Taylor v. Palmer, 31 Cal. 240. Followed in Manning v. Den (1891), 90 Cal. 610; City of Raleigh v. Peace (1892), 110 N. C. 32; Higgins v. Ausmuss, 77 Mo. 351; Neenan v. Smith, 50 Mo. 525; Macon v. Patty, 57 Miss. 378; Craw v. Tolono, 96 Ill. 255; Virginia v. Hall, 96 Ill. 278; Jaffery v. Gough, 36 Cal. 104; Seattle v. Yerter, 1 Wash. Ter. 576; Broadway v. McAtee, 8 Bush, 508; Burlington v. Quick, 47 Iowa, 246; Green v. Ward, 82 Va. 324. See, also, Davidson v. New Orleans, 96 U. S. 97.

² A letter from the commissioners of public works, accompanying the transmission to the assessors of the assessment list, map and certificate of costs of a local improvement, is no part of the record, as the statute relating to the subject makes it the duty of the commissioner simply to certify to the total amount of expenses incurred; and hence, in an action to recover back the payment of such assessment, the letter is not admissible to show that the assessment is void on its face because the work was done by the day and not by contract. Trippler v. City of New

York (1891), 125 N. Y. 617; s. c., 26 N. E. Rep. 721, reversing s. c., 6 N. Y. Supl. 48.

³ "By coercion in fact is meant that duress of person or goods where present liberty of person or possession of goods is so needful and desirable as that an action or proceeding at law to recover them will not at all answer the purpose. Duress of person is exemplified in Forshay v. Ferguson, 5 Hill, 154; Eadie v. Slimmon, 26 N. Y. 9. The cases of Maxwell v. Newbold, 18 How. 511, and Harmony v. Bingham, 12 N. Y. 99, illustrate what is duress of goods." Per Folger, J., in Peyser v. Mayor &c., 70 N. Y. 497. See, also, Robertson v. Frank Bros. Co., 133 U. S. 17, a case of duress of goods. It is generally held that there must be an actual or threatened seizure of the person or divestiture of his goods. Phelps v. Mayor &c., 112 N. Y. 216. A mere protest is of no avail. Bepler v. Cincinnati, 23 Wkly. Law Bul. 229, and cases there cited; Wilson v. Pelton, 40 Ohio St. 306; Jackson v. Newman, 59 Miss. 385; Forbes v. Appleton, 5 Cush. 115; Comm'rs v. Walker,

⁴ Peyser v. Mayor &c., 70 N. Y. 497; Phelps v. City of New York, 112 N. Y. 216.

§ 1191. **The same subject continued.**—There is a broad distinction between an assessment which is illegal by reason of the existence of some fact outside of the record, but not void, and one void on the face of the record for lack of jurisdiction of the person or property, or by reason of the unconstitutionality of the statute under which the assessment is made. In the latter case if money is exacted by coercion in fact, it may be recovered from the municipality in an action at law brought by the wronged tax-payer.¹ But in case money is collected under an illegal (not void) assessment it cannot be recovered until the assessment is set aside.²

8 Kan. 431; *Clafin v. McDonough*, 33 Mo. 412. In Nebraska it is provided by statute that any person aggrieved by an assessment may pay the same under protest with notice in writing that he intends to sue to recover it, "which notice shall particularly state the alleged grievance and ground thereof." Certain lots were assessed for the cost of grading the street on which they abutted. The owner paid the taxes so assessed, accompanying the payment with the following notice: "*Truman Buck, Treasurer*: I this day pay you, under protest, \$2,181.23, for special grading tax on property fronting on Fifteenth street, south of Williams street. This is paid to save penalty; and, as it is believed that the tax is illegal, I shall collect the same back. AUGUSTUS KOUNTZ." It was held that the notice was insufficient. *City of Omaha v. Kountz*, 25 Neb. 60. Payment to prevent a levy on lands is not under compulsion. *Wills v. Austin*, 53 Cal. 152; *Detroit v. Martin*, 34 Mich. 171; *Russell v. Mayor*, 35 Hun, 348. *Contra*, *Seeley v. Westport*, 47 Conn. 294. See, also, *Cooley on Taxation* (2d ed.), 611. In an action against a municipal corporation to recover the amount of a void assessment alleged to have been made under coercion, it appeared that at the time of the pay-

ment plaintiff was under contract to sell the land assessed. Defendant refused to accept a deposit of the assessment as indemnity, or to delay the sale until the validity of the assessment could be determined, and ordered the property to be advertised for sale. The receiver of taxes notified plaintiff, who was at the time seriously ill, that her property would be sold unless the assessment was paid. The court ruled that the assessment was not paid voluntarily, and gave judgment for the plaintiff. *Vaughn v. Village of Port Chester*, 15 N. Y. Supl. 474. In the absence of proof payment is presumed to be voluntary. *People v. Carter*, 119 N. Y. 557.

¹ "When the facts which render an assessment, apparently a lien upon land, invalid for want of jurisdiction to make it, are *dehors* the record, the person paying the assessment may recover back the money paid without first vacating the assessment." *Pooley v. City of Buffalo*, 122 N. Y. 592; s. c., affirmed, 124 N. Y. 206; *Diefenthaler v. Mayor &c.*, 111 N. Y. 331. But in Massachusetts the only remedy in such a case is by *certiorari*. *Foley v. City of Haverhill*, 144 Mass. 352.

² *Trimmer v. City of Rochester* (N. Y., 1892), 29 N. E. Rep. 746; *Horn v.*

§ 1192. The same subject continued — “Coercion in law.”

But one upon whose land an assessment is laid apparently valid, although in truth utterly void by reason of facts outside of the record, who pays it in ignorance of those facts, may recover the amount in an action against the municipality. Such a payment is made under circumstances which constitute what is termed coercion in law.¹

Town of New Lots, 83 N. Y. 101; Pursell v. Mayor, 85 N. Y. 330; Strusburgh v. Mayor, 87 N. Y. 452; Bruecher v. Village of Port Chester, 101 N. Y. 240; Jex v. Mayor, 103 N. Y. 536. “The rights of persons from whom money is collected under such assessments are like those of persons from whom money is collected under judgments void, for example, for lack of jurisdiction, and those which are reversible for error. Money collected under void judgments may be recovered without first setting them aside, but that collected under judgments erroneously obtained cannot be until they are reversed.” Trimmer v. City of Rochester, *supra*. The reversal of the assessment and the declaration that it was illegal and void is conclusive that the money was obtained without primary right, and *ex æquo et bono* belongs to the person who made the payment, and that it is held for his use. Peyser v. Mayor &c., 70 N. Y. 497; Brehm v. Mayor &c., 39 Hun, 533. One who has paid an assessment for a local municipal improvement, and afterwards has successfully instituted legal proceedings to vacate the assessment, may recover back the money paid, although the fact of payment would have afforded ground for a refusal to vacate the assessment. Jones v. New York, 37 Hun, 513.

¹ “Coercion by law is where the court having jurisdiction of the person and the subject-matter has ren-

dered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he cannot resist the execution of it when execution is attempted he may as well pay the amount at one time as at another and save the expense of delay.” Per Folger, J., in Peyser v. Mayor, &c., 70 N. Y. 497, where it was further said that coercion of law exists where there are adjudications of inferior tribunals when their proceedings are regular on their face and make out a right to have and demand an amount to be levied or collected in due course of law by a sale of goods or a municipal lease of real estate. Unless void on their face they have the force of a judgment, and the party is legally bound to pay and has no lawful mode of resisting. Where a judgment foreclosing a mortgage directs payment of a municipal assessment from the proceeds of the referee's sale, and payment is made accordingly, the payment is made under coercion in the sense that the mortgagor may maintain an action against the city for the recovery of the amount, after the assessment is vacated. Brehm v. New York, 39 Hun, 533. Where by an assessment the entire cost of a street pavement was imposed on the property fronting on the avenue, though a former ordinance required a railroad company to pay for twenty-five feet of

§ 1193. Apportionment by superficial area.—Apportionment of benefits by superficial area of the property affected by an improvement is sometimes provided. This method has been sustained in levee cases,¹ and for the construction of sewers.²

§ 1194. Apportionment by value — Rule in Arkansas and Tennessee.—In Arkansas under a constitution requiring all property to be taxed by a uniform rule “according to its true value in money,” assessments for paving cannot be laid according to frontage;³ and under a similar provision in the constitution of Tennessee, frontage assessments for paving are declared invalid.⁴

the pavement in the middle of the avenue, a property owner who had paid the assessment in ignorance of the ordinance was entitled to recover back the excess over and above that amount for which his property was liable. *Burchell v. City of New York*, 9 N. Y. Supl. 196. See, also, *Delano v. Mayor*, 32 Hun, 144. Coercion *in fact*, however, is necessary to sustain a recovery where the payment is made with knowledge of the circumstances which destroy the validity of the assessment. *Lott v. Swezey*, 29 Barb. 87, 92; *Peyser v. Mayor &c.*, 70 N. Y. 497; *Trippler v. City of New York*, 125 N. Y. 617; s. c., 26 N. E. Rep. 721, where the evidence was held sufficient to create a presumption of notice of the facts. But it was said in the same case that the rule would not apply if the proceedings were so far valid that they could not be set aside in any other way than by reversal for error. The facts must be of such a character as to render the judgment void.

¹ *Crowly v. Copely*, 2 La. Ann. 329; *Wallace v. Shelton*, 14 La. Ann. 498; *Yeatman v. Crandall*, 11 La. Ann. 220; *Bishop v. Marks*, 15 La. Ann. 147; *Daily v. Swope*, 47 Miss. 367;

Egyptian Levee Co. v. Hardin, 27 Mo. 495; *Richardson v. Morgan*, 16 La. Ann. 429; *McGehee v. Mathis*, 21 Ark. 40; *Smith v. Aberdeen*, 25 Miss. 458; *O'Reilly v. Holt*, 4 Woods, 645; *Williams v. Cammack*, 27 Miss. 209; *Alcorn v. Hamer*, 38 Miss. 652; *Cooley on Taxation* (2d ed.), 648. “And the same principle must obtain in cases affecting rural highways.” *Elliott on Roads and Streets*, 394.

² *Keese v. Denver*, 10 Colo. 112. See, also, *Clapp v. Hartford*, 35 Conn. 66; *Grimmell v. Des Moines*, 57 Iowa, 144; *City of St. Joseph v. Farrell* (Mo., 1891), 17 S. W. Rep. 497; *Gillette v. Denver*, 21 Fed. Rep. 822. But where the act made no provision by which parties might avail themselves of the benefit, and no distinction between lots directly and those remotely benefited, and did not confine the assessment to lands upon the street in which the sewer was laid, this basis of assessment was repudiated as unjust. *Thomas v. Gain*, 35 Mich. 155.

³ *Peay v. Little Rock*, 32 Ark. 31. See, also, *Town of Monticello v. Banks*, 48 Ark. 251; s. c., 2 S. W. Rep. 852.

⁴ *McBean v. Chandler*, 9 Heisk. 349; s. c., 24 Am. Rep. 308, distinguishing *Franklin v. Maberry*, 6

§ 1195. **The frontage rule.**—When the property consists of lots of substantially equal depth abutting a local improvement and there is nothing in the nature and circumstances of the particular case showing that an assessment in proportion to the frontage of the lots upon the improvement would work manifest injustice, such a mode of assessment will be upheld. Rules of apportionment according to value, area and frontage of the property benefited have in turn been approved and disapproved under varying circumstances. Absolute equality is not to be expected. A reasonable approximation thereto is all that can be required; and where the proper legislative body prescribes in good faith a rule by which this may be attained with reasonable certainty it should not be overthrown.¹

Humph. (Tenn.) 371; Washington v. Nashville, 1 Swan, 177 (sidewalk cases). See, also, City v. McQuillikin, 9 Dana (Ky.), 513. And cf. Joyes v. Shadburn (Ky.), 13 S. W. Rep. 361. Sewer assessments by frontage condemned as unreasonable in Clapp v. Hartford, 35 Conn. 66. See, also, State v. Newark, 37 N. J. Law, 415. And cf. Warren v. Grand Haven, 30 Mich. 24; Seeley v. Pittsburgh, 82 Pa. St. 360; Hoyt v. East Saginaw, 19 Mich. 39. "It would seem to the author that the frontage rule whenever admissible is better adapted to sidewalks and sewers than to paving and grading." 2 Dillon's Munic. Corp., § 809, n. 1, on p. 990. Frontage assessments held inapplicable to rural districts. City of Allentown v. Adams (Pa.), 8 Atl. Rep. 430; Washington Avenue, 69 Pa. St. 352; Philadelphia v. Rule, 93 Pa. St. 15; Craig v. City, 89 Pa. St. 268; Parkland v. Ganis (Ky.), 11 S. W. Rep. 649. Test of rural or urban character of property. Stewart v. Philadelphia (Pa.), 7 Atl. Rep. 192; Keith v. City of Philadelphia, 126 Pa. St. 575. Assessment of corner lots by double frontage permissible. Morrison v. Hershire, 32

Iowa, 271; Wolf v. Keokuk, 48 Iowa, 129; City of Springfield v. Green, 120 Ill. 269; Walker v. City of Aurora (Ill.), 29 N. E. Rep. 741. Practical frontage not the mode. Officials must be guided by plots and records. Scott County v. Hinds (Minn., 1892), 52 N. W. Rep. 523. Estimate of frontage where street is intersected by alleys. Kennett Square v. Entriken, 7 Pa. Co. Ct. Rep. 469.

¹ City of Pueblo v. Robinson, 12 Colo. 593, 599; City of Pueblo v. Robinson, 12 Colo. 593; Thomas v. Gain, 35 Mich. 155. Frontage assessments have been sustained in Ulman v. Mayor &c., 72 Md. 587; City of Raleigh v. Peace, 110 N. C. 32; Pennock v. Hoover, 5 Rawle, 291; Magee v. Commonwealth, 46 Pa. St. 358; Wilbur v. City of Springfield, 123 Ill. 395; s. c., 14 N. E. Rep. 871; Covington v. Boyle, 6 Bush, 204; Davis v. City of Lynchburg, 84 Va. 861; s. c., 6 S. E. Rep. 230; State v. Elizabeth, 30 N. J. Law, 365; O'Reilly v. City of Kingston, 114 N. Y. 439; State v. Fuller, 34 N. J. Law, 227; Barber Asphalt Paving Co. v. Gogreve, 41 La. Ann. 251; Wilder v. Cincinnati, 26 Ohio St. 284; Jennings v. Le Breton, 80 Cal. 8; Parker v.

§ 1196. Assessments exceeding value of property.—In Pennsylvania the frontage rule of assessment for street improvements was applied to a long narrow strip of city property lying alongside a street, although the assessment was greater than the value of the lot. “If the objection were to prevail,” said the court, “it would be very easy for the owners of a valuable lot to convey a narrow strip of the front to a convenient friend and thus escape altogether.”¹

§ 1197. Assessments according to benefit.—The method of apportioning the expense of an improvement as between individuals which is most frequently used in this country is an assessment upon the estates benefited in proportion to the

Challis, 9 Kan. 155; Neenan v. Smith, 50 Mo. 525; Whiting v. Quackenbush, 54 Cal. 306; Palmer v. Stumpf, 29 Ind. 329; Stebbins v. Kay, 51 Hun, 589; Allen v. Grew, 44 Vt. 174; City of Denver v. Knowles (Colo.), 30 Pac. Rep. 1041; Motz v. Detroit, 18 Mich. 495; State v. Reis, 38 Minn. 371; s. c., 38 N. W. Rep. 97; King v. Portland, 2 Or. 146; Cleveland v. Tripp, 13 R. I. 50; White v. People, 94 Ill. 604; Winona &c. R. Co. v. City of Watertown (S. Dak.), 44 N. W. Rep. 1072; Shely v. Detroit, 45 Mich. 431. That lots vary in depth was held immaterial in Bacon v. City of Savannah, 86 Ga. 301; s. c., 12 S. E. Rep. 580; Beaumont v. City of Wilkes Baire (Pa.), 21 Atl. Rep. 888, and Amery v. City of Keokuk, 72 Iowa, 701; s. c., 30 N. W. Rep. 780. The Illinois constitution of 1848 requiring uniformity of taxation and providing for levying a tax by valuation was construed to forbid frontage assessments for the improvement of streets and sidewalks. City of Chicago v. Larned, 34 Ill. 203; City of Ottawa v. Spencer, 40 Ill. 211. After that interpretation of the constitution the latter was radically changed for the very purpose of avoiding inconveniences which had been found to re-

sult from those decisions. Under the present constitution of 1870 frontage assessments are valid under the power of *special taxation* provided for in that instrument. White v. People, 94 Ill. 604; Craw v. Tolono, 96 Ill. 255; Bigelow v. Chicago, 90 Ill. 53; Fagan v. Chicago, 84 Ill. 234; Enos v. Springfield, 113 Ill. 65; Galesburg v. Searles, 114 Ill. 217; Watson v. Chicago, 115 Ill. 78; City of Sterling v. Galt, 117 Ill. 15; City of Springfield v. Greene, 120 Ill. 269. In the latter case Mr. Justice Mulkey said that if it were a new question he and perhaps other members of the court would adhere to the former view.

¹ McCormick's Estate v. City of Harrisburg (Pa., 1889), 18 Atl. Rep. 126. In Stifel v. Brown (1887), 24 Mo. App. 102, it was held that such a conveyance made with that intent would not operate to relieve the residue. Holt, J., in a vigorous opinion in Preston v. Rudd, 84 Ky. 151, declares that an assessment exceeding the value of the land is *spoliation*, not taxation, and cannot be tolerated under our form of government. It is conceded that the courts of Missouri and California have held otherwise.

special benefit that an examination of each estate shows that it has received. "The legislature in such cases makes the rule and the proper officers give effect to it in a manner corresponding to the ordinary assessment for a taxation by values. The right thus to assess by benefits has been often affirmed and can no longer be regarded as a controverted question."¹

§ 1198. Rule in sewer assessments.—An ordinance assessing owners of lots and buildings benefited by a sewer, in proportion to their value, including the buildings, and the owners of vacant lots in proportion only to the value of the lots, was held to be unjust and unreasonable, because the apportionment should have been made upon the value of the lands independent of the buildings;² and a subsequent ordinance and assessments under it, in which the value of the buildings was not considered, were sustained.³

§ 1199. Contractor's default no defense to the lot-owner.—Where the contractor makes an unauthorized departure from the terms of the contract, it is generally no defense in proceedings to collect the assessment. Thus, it was said in a case in New Jersey that "no misconstruction or malconstruction of the work arising from the incapacity, the honest mistake, or the fraud of the contractor would invalidate the assessment, or relieve the parties assessed from the obligation of paying it. In this respect the property owners . . .

¹ Cooley on Taxation (2d ed.), 639, 345; Appeal of Piper, 32 Cal. 530; La Fayette v. Fowler, 34 Ind. 140.

citing (among other cases) *McMasters v. Commonwealth*, 3 Watts (Pa.), 292; *Fenelon's Petition*, 7 Pa. St. 173; *Weber v. Reinhard*, 73 Pa. St. 373; *People v. Brooklyn*, 4 N. Y. 419; *Jones v. Boston*, 104 Mass. 461; *Nichols v. Bridgeport*, 23 Conn. 189; *Marrion v. Epler*, 5 Ohio St. 250; *Howard v. The Church*, 18 Md. 457; *Howell v. Bristol*, 8 Bush (Ky.), 493; *State v. Fuller*, 34 N. J. Law, 227; *Brevort v. Detroit*, 24 Mich. 322; *Chicago v. Baer*, 41 Ill. 306; *Matter of Torrance Street*, 4 R. I. 230; *Uhrig v. St. Louis*, 44 Mo. 458; *Emery v. Gas Co.*, 28 Cal.

² *Boston v. Shaw*, 1 Met. 130.

³ "It is like the case of sidewalks, where an assessment is levied for a common benefit, present or future, existing actually or in expectation, and the party should be charged although he never actually uses the drain." *Downer v. Boston*, 7 Cush. 277; *Bréwer v. Springfield*, 97 Mass. 152; *Snow v. Fitchburg*, 136 Mass. 183. See, also, *Creighton v. Scott*, 14 Ohio St. 438; *Seattle v. Yesler*, 1 Wash. T. 577.

must stand upon the same footing with parties assessed for taxes for the public benefit. They take the hazard incident to all public improvements, of their being faulty or useless through the incapacity or fraud of public servants. The pretext that a tax-payer shall avoid the payment of his assessment because the funds are injudiciously applied is the worst form of repudiation."¹

§ 1200. Injunction against illegal assessments.—It is a general rule that equity will not interfere by injunction with the collection of an assessment unless in addition to illegality, hardship or irregularity the case is brought within some one or more of the recognized heads of equity jurisdiction; and in no case will it interfere for mere errors or excess of valuation, hardship or injustice of the law, or which can be redressed in a legal forum.²

¹ *State v. Jersey City*, 29 N. J. Law, 441, 449. See, also, *Murray v. Tucker*, 10 Bush, 240; *Taylor v. Palmer*, 31 Cal. 240; *Conlin v. Seaman*, 22 Cal. 549; *Bouton v. Neilson*, 3 Johns. 475; *Windsor v. Field*, 1 Conn. 284; *Lowell v. Hadley*, 8 Met. 194; *Nolan v. Reese*, 32 Cal. 484; *Peoria v. Kidder*, 26 Ill. 358; *Hughes v. Kline*, 30 Pa. St. 230; *Williams v. Holden*, 4 Wend. 227; *Cochran v. Collins*, 29 Cal. 129; *Henderson v. Lambert*, 14 Bush, 24. Cf. *Matter of Orphan Home*, 92 N. Y. 116.

² *Strenna v. City Council &c.*, 56 Ala. 340, where the alleged irregularities were not brought to the notice of the municipal tribunal, where they might have been corrected; *Dixon v. City of Detroit (Mich.)*, 49 N. W. Rep. 628; *Elyton Land Co. v. Ayres*, 62 Ala. 413; *Mayor v. Stone*, 57 Ala. 61; *Rhea v. Umatilla County*, 2 Oregon, 300; *Mayor v. Meserole*, 20 Wend. 132; *Hovey v. Mayor*, 43 Me. 322; *Mooers v. Smedley*, 6 Johns. Ch. 28; *Gage v. Evans*, 90 Ill. 509; *Heywood v. City of Buffalo*, 14 N. Y. 534; *Hoke v. Perdue*, 62 Cal. 545; *Susque-*

hanna Bank v. Supervisor, 25 N. Y. 312; *Douglas v. Town of Harrisville*, 9 West Va. 162; *Du Page v. Jenks*, 65 Ill. 272; *Lenon v. Mayor*, 55 N. Y. 363; *Tucker v. Sellers (Ind.)*, 30 N. E. Rep. 531; *Old Colony &c. R. Co. v. Fall River*, 147 Mass. 455; *State v. District Court (Minn.)*, 50 N. W. Rep. 476; *Sunderland v. Martin*, 113 Ind. 411; *Hoffeld v. City of Buffalo (N. Y.)*, 29 N. E. Rep. 747; *People v. McCreery*, 34 Cal. 433; *Kennedy v. City of Troy*, 77 N. Y. 493 (*Clark v. Village of Dunkirk*, 75 N. Y. 612, distinguished); *Tingue v. Village of Portchester*, 101 N. Y. 294; *Williams v. School District*, 21 Pick. 75; *Chinn v. Trustees*, 32 Ohio St. 238; *Loesnitz v. Seelinger*, 127 Ind. 422; s. c., 26 N. E. Rep. 887; *Chicago &c. R. Co. v. Siders*, 88 Ill. 320; *Sayre v. Tompkins*, 23 Mo. 443; *Ricketts v. Spraker*, 77 Ind. 371; *Barrow v. Davis*, 46 Mo. 394; *McCormack v. Patchin*, 53 Mo. 33; s. c., 14 Am. Rep. 440, and note; *McDonald v. Murphree*, 45 Miss. 705; *Cross v. Mayor*, 18 N. J. Eq. 305. Cf. *Paulson v. City of Portland*, 16 Oregon, 450. Questions properly triable on

§ 1201. The same subject continued.—Injunction to restrain the collection of an assessment on account of irregularities in the proceedings will not issue where the parties seeking it have unreasonably delayed to ask relief, and where a re-assessment can be ordered, especially where the assessment is void and a remedy exists at law.¹ And it is a just and well settled rule that a property owner cannot stand by in silence, with full knowledge of all the facts, and permit an expenditure of large sums of public money in the making of improvements which enhance the value of his property, and, after all the work has been completed, complain successfully of irregularities in order to defeat the collection of an assessment.²

appeal cannot be tried on injunction. *Balfe v. Lammers*, 109 Ind. 347, Questions that go to the jurisdiction may be raised on injunction. *Wilson v. Poole*, 33 Ind. 443; *Goring v. McTaggart*, 92 Ind. 200; *City of Fort Wayne v. Shraff*, 106 Ind. 66; *Curry v. Jones*, 4 Del. Ch. 559; *Keese v. City of Denver*, 10 Colo. 112; s. c., 15 Pac. Rep. 825; *Makemson v. Kauffman*, 35 Ohio St. 444; *Fremont v. Boling*, 11 Cal. 380; *Town of Covington v. Nelson*, 35 Ind. 532; *Cummins v. National Bank*, 101 U. S. 153; *Dunwiddie v. Town of Rushville*, 37 Ind. 66. Fraudulent assessment may be enjoined. *Wright v. Railroad Co.*, 64 Ga. 782; *Merrill v. Humphrey*, 24 Mich. 170. See, also, *Hassen v. City of Rochester*, 65 N. Y. 516; *Hersey v. Supervisors*, 16 Wis. 198; *Matter of Livingston*, 121 N. Y. 94; *Mayor &c. v. Johnson*, 62 Md. 225; *Crabtree v. Gibson*, 78 Ga. 230; *Elliott on Roads and Streets*, 441. May be granted to prevent a cloud on title. *Albu-*

querque v. Zeiger (N. M.), 27 Pac. Rep. 315. *Cf. Bock v. City of Brooklyn*, 2 N. Y. Supl. 559. On injunction to restrain a betterment assessment for want of notice the abutting owner who has permitted the improvement to be made without objection must do equity by paying the amount to which his property was benefited. *Barker v. Omaha*, 16 Neb. 269. See, also, *Appeal of Pittsburgh* (Pa.), 12 Atl. Rep. 366; *City of Elkhart v. Wickwire*, 121 Ind. 331; s. c., 22 N. E. Rep. 342.

¹ *Byram v. Detroit*, 50 Mich. 56, where the petitioners had not offered to pay any part of the tax but sought to avoid the whole of it. They were presumptively benefited and ought to pay their equitable proportion. See, also, *Albany &c. Mining Co. v. Auditor-General*, 37 Mich. 393.

² *Lundrom v. City of Manistee*, (Mich., 1892), 53 N. W. Rep., 161; *Ritchie v. South Topeka*, 38 Kan. 368; s. c., 16 Pac. Rep. 332.

CHAPTER XXIX.

CONTROL OF STREETS AND WHARVES.

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| <p>§ 1202. Power to vacate streets.
1203. Restraining the vacation of a street.
1204. Discontinuance of ways.
1205. Discretion in improving unused streets.
1206. Damages for closing a street—Massachusetts decisions.
1207. Use of streets for private purposes.
1208. Powers not to be surrendered.
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§ 1202. Power to vacate streets.—A city, under the Iowa code, has authority to vacate a part of a street for the benefit of the general public, although the lots fronting on it may be

somewhat depreciated in value thereby.¹ The legislature, either by its own act, or by authority delegated to municipal corporations, has power to order the vacation of any public street or highway. The absence of a formal ordinance declaring the streets vacated will not defeat a railroad company's right of occupation of such streets, if such right is otherwise unequivocal.² A charter which gave the common council of a city in Wisconsin among others the power to vacate streets and alleys, to be exercised "anything in any general law of the State to the contrary notwithstanding," was held to vest in the council exclusive power in vacating streets and alleys, although the circuit courts of the State by a statute possess authority to vacate any recorded plat of a city or village, or part thereof, and to vest the title of the streets vacated in the owners of the abutting lots.³ And it is not within the province of the courts to determine that there must be public streets or highways kept open when the town plat shows that no streets are located, the city council having full control over the opening and vacation of streets and highways within a city.⁴

§ 1203. Restraining the vacation of a street.—One who merely suffers an inconvenience in common with all other persons from the vacation of a street on which none of his property abuts cannot have an injunction to restrain the enforcement of a city ordinance vacating such street.⁵ The question whether a street should be kept open or closed is for the municipal assembly and not for the courts.⁶ And where

¹ *Williams v. Corey*, 73 Iowa, 194; s. c., 34 N. W. Rep. 813.

² *McGee's Appeal*, 114 Pa. St. 470; s. c., 8 Atl. Rep. 237.

³ *Brandt v. City of Milwaukee* (1887), 69 Wis. 386; s. c., 34 N. W. Rep. 246. The jurisdiction of the courts in the matter is purely statutory. *Warren v. City of Wausau*, 66 Wis. 206.

⁴ *Platt v. Chicago & C. R. Co. (Iowa)*, 31 N. W. Rep. 883. In Pennsylvania the town council of a borough has the right to open a street laid down in the general plan of a town, even

if, in doing so, it will necessarily and unavoidably close up and obstruct another highway not laid down in the town plan, but which has become a highway by having been the bed of an artificial road belonging to a turnpike company, which, on being abandoned by the company, became a public road under the general laws of Pennsylvania. *Appeal of Commonwealth (Pa.)*, 9 Atl. Rep. 524.

⁵ *Glasgow v. City of St. Louis (Mo.)*, 17 S. W. Rep. 743.

⁶ *Glasgow v. City of St. Louis*, *supra*.

a city has the power to vacate streets, it makes no difference in the exercise of that power whether the public acquired the street to be vacated by condemnation or by dedication.¹ It is within legislative discretion to direct in a statute relating to the vacation of streets that the jury ascertain both damages and benefits, and apply the latter directly to the payment of the former.² And a non-adjacent property owner is not entitled to damages caused by vacating a street under the Illinois statute where ingress and egress to his property is not affected by the vacation, and where the damages suffered consist of mere inconvenience common to the general public.³

§ 1204. Discontinuance of ways.—In proceedings by petition to the common council of a city to discontinue a portion of a street it is in the discretion of the council to determine as to the public convenience and necessity of such discontinuance, and where there has been no glaring informality or illegality in the proceedings their judgment should not be disturbed.⁴ The legality of such proceedings would not be affected by the fact that the expense attendant upon the discontinuance was borne by some one, and the city saved thereby from the burden.⁵ Nor are proceedings in relation to the discontinuance of ways affected on account of there being

¹*Glasgow v. City of St. Louis* (Mo.), 17 S. W. Rep. 748.

²*In re Vacation of Howard St.* (Pa.), 21 Atl. Rep. 974, where a statute directing that damages awarded to property owners for the vacation of a street shall be assessed on the owners of properties benefited was held not to be unconstitutional, so long as the basis of the assessment should be the special benefit, although the city was under no constitutional obligation to pay for such damages.

³*City of East St. Louis v. O'Flynn*, 119 Ill. 200; s. c., 10 N. E. Rep. 395. See, also, *Whitsett v. Union Depot & R. Co.*, 10 Colo. 243.

⁴*Pillsbury v. City of Augusta*

(1887), 79 Me. 71; s. c., 8 Atl. Rep. 150.

⁵*Pillsbury v. City of Augusta* (1887), 79 Me. 71; s. c., 8 Atl. Rep. 150. See, also, *Parks v. Boston*, 8 Pick. 218, in which the court met a similar objection in these words:—"If the public necessity and convenience required the alteration it is immaterial at whose expense it was made. A donation or contribution from individuals to relieve the burden upon the city has no tendency to prove that the enlargement of the street was not a public benefit. It is not material at whose expense such are laid out or altered." *Gay v. Bradstreet*, 49 Me. 580; *Coombes v. County Comm'rs*, 68 Me. 484.

no determination in relation to damages and nothing done upon that subject.¹

§ 1205. Discretion in improving unused streets.—A city, as against a lot-owner, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel a street over which a public easement extends, to its entire width; and whether it will so open and improve it, or whether it should be so opened or improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements is committed. With this discretion of the authorities courts cannot ordinarily interfere upon the complaint of a lot-owner, so long as the easement continues to exist; and no mere non-user, however long continued, will operate as an abandonment of the public right, even though until needed for a public use the authorities should treat the street as the property of the owner of the lot abutting. The public authorities will not be thereby estopped from removing obstructions therefrom, and opening and fitting it for public use to its entire width.² The public use is the dominant interest, and the public authorities are the exclusive judges when and to what extent the streets of a city shall be improved. Courts can interfere only in case of fraud or oppression constituting manifest abuse of discretion.³

§ 1206. Damages for closing a street — Massachusetts decisions.—An owner of land which has been diminished in value by the diversion of travel, caused by closing a part of a street, where the access from the land to the system of public streets remains substantially unimpaired, has no cause of action for damages against the municipality for discontinuing the street.⁴

¹Howland v. County Commissioners, 49 Me. 143; Hicks v. Ward, 69 Me. 441.

²Chase v. City of Oshkosh (Wis., 1892), 51 N. W. Rep. 560; State v. Leaver, 62 Wis. 387; s. c., 22 N. W. Rep. 576; Reilly v. City of Racine, 51 Wis. 526; s. c., 8 N. W. Rep. 417; Childs v. Nelson, 69 Wis. 125; s. c., 33 N. W. Rep. 587.

³Benson v. Village of Waukesha, 74 Wis. 31, 39; s. c., 41 N. W. Rep. 1017; Wright v. Forrestal, 65 Wis. 341; s. c., 27 N. W. Rep. 52; Pontiac v. Carter, 32 Mich. 164; Brush v. City of Carbondale, 78 Ill. 74.

⁴Stanwood v. City of Malden (Mass., 1892), 31 N. E. Rep. 702; following Smith v. Boston, 7 Cush. 254. See, also, Castle v. Berkshire, 11 Gray, 26;

§ 1207. Use of streets for private purposes.—The exclusive power granted a common council by statute over the streets and alleys of a city does not extend to authorizing the construction for private purposes of a log way or elevated platform upon lands used in connection with a wharf so as to obstruct the use of the wharf. Such power of the council is to be exercised only for the benefit of the general public.¹ Streets, alleys and highways are held in trust for the public for public purposes and no other. A common council has no power or authority to authorize the permanent possession of a public highway, street or alley for private purposes.²

Davis v. Commissioners, 153 Mass. 218; s. c., 26 N. E. Rep. 848; *Hammond v. Commissioners*, 154 Mass. 509; s. c., 28 N. E. Rep. 903; *Coster v. Mayor &c.*, 43 N. Y. 399, 414; *Fearing v. Irwin*, 55 N. Y. 486; *Paul v. Carver*, 24 Pa. St. 207; *McGee's Appeal*, 114 Pa. St. 470; s. c., 8 Atl. Rep. 237; *Gerhard v. Commissioners*, 15 R. I. 334; s. c., 5 Atl. Rep. 199; *Clark v. City of Providence*, 16 R. I. 337; s. c., 15 Atl. Rep. 763; *Polack v. Orphan Asylum*, 48 Cal. 490; *Kimball v. Homan*, 74 Mich. 699; s. c., 42 N. W. Rep. 167; *Chicago v. Building Ass'n*, 102 Ill. 379; *East St. Louis v. O'Flynn*, 119 Ill. 200; s. c., 10 N. E. Rep. 395; *Barr v. Oskaloosa*, 45 Iowa, 275. The proposition on which *Smith v. Boston*, 7 Cush. 254, was decided was that, to lay a foundation, under the Massachusetts statutes, for a claim of damages for discontinuing a highway, it was not enough to show that a shop had suffered by the diversion of travel, or that the owner found travel less convenient at a distance from his place, if the access to the system of principal streets remained substantially unimpaired.

¹ *Adams v. Ohio Falls Co. (Ind.)*, 1892, 31 N. E. Rep. 57.

² *State v. Berdetta*, 73 Ind. 185; *Sims v. City of Frankfort*, 79 Ind. 446; *Elliott on Roads and Streets*,

490. In *Pettis v. Johnson*, 56 Ind. 139, it was held that the city had no power to authorize a property owner to put up an iron stairway in an alley, although the grant was founded upon a valuable consideration, and in pursuance of a contract by which the city acquired the use of the rooms to which the stairway led, for its council chamber and various city offices. In *Adams v. Ohio Falls Co. (Ind.)*, 31 N. E. Rep. 57, the court said:—"Where a street or other public way is used for public purposes, such as for street railways or other improved methods of travel, the common council have authority to permit permanent obstructions to be placed on the streets; but they have no such power when the purpose is strictly private, and the public in no manner served." This distinction is illustrated in *Mikesell v. Durkee*, 34 Kan. 509; s. c., 9 Pac. Rep. 278, where the court sustained the right of an abutting land-owner to perpetually enjoin the construction of a railroad upon the street of a city by permission of the city authorities, not for the use of the public, but to transport grain between the elevator of the defendants and the railroad, the court holding the city had no right to grant such a permission.

§ 1208. Powers not to be surrendered.—The powers of a municipal corporation in respect to opening, improving and controlling its streets are held in trust for the public benefit, and cannot be surrendered by contract to private persons, or to a corporation, by resolution of the common council, or in any other manner.¹ A city may by condemnation proceedings take the property of a railway corporation for street purposes, as well as that of any other person; for its property not actually in use, or absolutely necessary for the enjoyment of the franchise, is subject to condemnation for other purposes, the same as the property of an individual.²

§ 1209. Liability for defective streets.—The courts have accepted generally as a correct statement of the law as to the liability of municipal corporations for injuries resulting from defective streets, that of Judge Dillon to this effect:—"In reference to this subject it may be remarked that there is undoubtedly more difficulty in defining the logical ground on which to base the doctrine of the implied liability of municipal corporations proper for defective streets, when such

¹ *Grand Rapids v. Grand Rapids &c. R. Co.* (1887), 66 Mich. 42; s. c., 33 N. W. Rep. 15, in which case a contract which the railroad company claimed existed between the city and itself, that the city would not open a street across its track, was held to be void on the ground that the laying out and opening of streets by the common council of a city is the exercise of its legislative functions, and any contract made by the city with an individual or corporation, by which it agrees that it will not in the future open or extend a street in any particular place or part of the city, is an abnegation of its legislative power, unauthorized by its charter, and may be alike destructive of the convenience and prosperity of the municipality. See, also, *Dillon on Munic. Corp.* (4th ed.), § 716; *Davis v. Mayor*, 14 N. Y. 506, 532; *People's*

Railroad v. Memphis Railroad, 10 Wall. 38.

² *City of Grand Rapids v. Grand Rapids H. R. Co.* (1887), 66 Mich. 42; s. c., 33 N. W. Rep. 15; *Enfield Toll Bridge Co. v. Hartford &c. R. Co.*, 17 Conn. 40; *Backus v. Lebanon*, 11 N. H. 19; *Peoria &c. R. Co. v. Peoria &c. R. Co.*, 66 Ill. 174; *Iron R. Co. v. Ironton*, 19 Ohio St. 299; *West River Bridge Co. v. Dix*, 6 How. 507; *Crosby v. Hanover*, 36 N. H. 404; *Richmond &c. R. Co. v. Louisa R. Co.*, 13 How. 71; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. The mortgagees of the franchises and easements of a railway company need not be made parties to a proceeding to condemn a right of way across its track for a street, if the track is not disturbed and the company is left in control of the road. *Grand Rapids v. Grand Rapids & I. R. Co.* (1886), 58 Mich. 641.

liability is denied as respects counties, and towns without special charters. There is also some apparent, if not real, difficulty in holding that such a liability exists on the part of municipal corporations in reference to streets without extending it to other duties which are everywhere conceded to give a private action for their neglect. The courts which hold the doctrine in question also differ as to the reasons on which it rests. Notwithstanding this, it will be found, we think, upon a careful examination of the cases referred to in the preceding sections, that they so establish the rule therein laid down as respects municipal corporations proper, and that Mr. Justice Hunt is quite right in saying that, whatever may be the true reason for the rule, 'the law in this country must be deemed to be settled in accordance with them.' It will also be found, we are quite sure, that the doctrine of such a liability on the part of municipal corporations organized under special charters, or under general incorporation acts, exists in the States very generally, and is not confined to the States of New York and Illinois. The doctrine works well, and is just, since no stimulus to the performance of duty is more effectual than the wholesome fear of the verdict of a jury for damages. While it must be admitted to be exceptional, the doctrine may, we think, be vindicated as resting upon the special nature of the duty itself, relating to streets in cities (which have peculiar and local uses distinct from State highways), which are under the direct and exclusive control of the municipal authorities, whose duty in respect of repairs is intrinsically ministerial, and upon the ample means which are applied for its performance, rather than upon the ideal notion of a contract between the State and the municipality, or upon the other notion of a special consideration received for the supposed implied promise faithfully to discharge the duty imposed by the charter or constituent act of the corporation."¹

§ 1210. The same subject continued.—The Kansas Supreme Court have declared the following rules applicable to actions against cities for injuries resulting from negligence on the part of the city as to the condition of its streets and side-

¹2 Dillon on Munic. Corp. (4th ed.), § 1023. See, also, chapter XXXVI on HIGHWAYS, *infra*.

walks:—Where a city is sued for injuries resulting from a defect in a sidewalk, it must appear either that the city had notice of the defect, or that it was a patent defect and had continued so long that notice might reasonably be inferred, or that the defect was one which, with reasonable and proper care, should have been ascertained and remedied.¹ Cities having the powers ordinarily conferred upon them respecting bridges, streets and sidewalks within their limits, owe to the public the duty of keeping them in a safe condition for use in the usual mode for travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty.²

§ 1211. The same subject continued — Defective sidewalks.—That a city has ample funds in its treasury, put there for the express purpose of repairing streets and sidewalks, is sufficient to fix its liability for injuries to a person resulting from an accident caused by a defective sidewalk.³ Where a charter of a city expressly confers upon its council the control of all sidewalks in the public streets and alleys of the city, it imposes a liability for neglect and consequent injury which the common law did not impose. Such a city is liable for injuries resulting from a defect in a sidewalk although the sidewalk may have been constructed by the adjoining property owner.⁴ It is the duty of a city to cause to be erected a barrier or obstruction, to apprise travelers of the termination of

¹ *Jansen v. Atchison*, 16 Kan. 358; *City of Topeka v. Tuttle*, 5 Kan. 311; *City of Atchison v. King*, 9 Kan. 550; *City of Ottawa v. Washabaugh*, 11 Kan. 124; *City of Wyandotte v. White*, 13 Kan. 191; *Smith v. City of Leavenworth*, 15 Kan. 81; *City of Leavenworth v. Casey*, McCahan's Rep. 122; *Weightman v. City of Washington*, 1 Black, 39; *West v. Brockport*, 16 N. Y. 161; *Davenport v. Ruckman*, 37 N. Y. 568; *Norristown v. Moyer*, 67 Pa. St. 355; *Rapho & W. H. Township v. Moore*, 68 Pa. St. 404; *Fort Scott v. Brothers*, 20 Kan. 455; *Gould v. Topeka*, 32 Kan. 485; s. c., 4 Pac. Rep. 822.

² *Jansen v. City of Atchison* (1876), 16 Kan. 358, in which case it was urged that the control and care which a city exercises over its streets and sidewalks are by virtue of a power of governmental character, and that it is not liable to the private action of an individual for neglecting to exercise such power or for its imperfect execution.

³ *Moon v. City of Ionia*, 81 Mich. 635; s. c., 46 N. W. Rep. 25.

⁴ *Fuller v. Mayor &c. of City of Jackson*, 82 Mich. 480; s. c., 46 N. W. Rep. 721. Cf. *McArthur v. Saginaw*, 58 Mich. 357; s. c., 25 N. W. Rep. 313.

the walk, where a sidewalk has been extended by private parties in front of their property to a point of danger — as to the edge of a deep creek; otherwise the city will be liable for injuries to one who should suffer from its neglect of duty in that respect.¹

§ 1212. Right of corporation to indemnity for damages paid.—The doctrine in New York is that municipal corporations are charged with the care, custody and control of the streets and highways within their limits, and the duty, primarily, rests upon them to keep such streets and highways in repair, so that they may be safely traveled upon by all having occasion to use them; and this duty is based upon the contract implied through the acceptance of a charter by such corporations from the State, devolving upon them the performance of such duties.² Such corporations are liable for damages arising from a neglect to perform this duty, in an action *ex delicto*, to persons lawfully using such streets and sidewalks, notwithstanding a duty to repair is also imposed upon the property owner in front of whose premises the injury occurred.³ If a municipality has been compelled to pay a judgment recovered against it for personal injuries from a defect or obstruction in one of its highways, which defect or obstruction was created by the wilful act or negligence of a third person, it may maintain an action for its reimbursement against that person; and the rule is the same when it has paid an undoubted liability without suit.⁴ So, if it has provided for the repair of its streets by contract with other parties and has had to pay for injuries to persons growing out of the neglect of the contractors, it may recover the same

¹ *Kinney v. City of Tekamah* (Neb., 1890), 46 N. W. Rep. 835. As to liability of city for defects in streets or sidewalks, see, also, *Thiessen v. City of Belle Plaine* (Iowa), 46 N. W. Rep. 854; *Ray v. City of St. Paul*, 44 Minn. 340; s. c., 46 N. W. Rep. 675; *Readdy v. Borough of Shamokin* (Pa.), 20 Atl. Rep. 396; *Gaylord v. City of New Britain* (Conn.), 20 Atl. Rep. 365; *Burns v. City of Bradford* (Pa.), 20 Atl. Rep. 997.

² *Conrad v. Ithaca*, 16 N. Y. 158; *Saulsbury v. Ithaca*, 94 N. Y. 27.

³ *Russell v. Canastota*, 98 N. Y. 496; *State v. Gorham*, 37 Me. 457; *Gridley v. Bloomington*, 88 Ill. 554; *Robbins v. Chicago*, 4 Wall. 657.

⁴ *Thompson on Negligence*, 789; *Rochester v. Montgomery*, 72 N. Y. 65; *Village of Fulton v. Tucker*, 3 Hun, 529.

from the contractors. The principle governing in such cases is that these parties are primarily liable to the person injured, and the municipality by paying the damages is subrogated to the remedies of the person whose damages have been satisfied.¹

§ 1213. The same subject continued.— But where a charter imposes upon lot-owners the duty of keeping the sidewalk adjoining the lots in repair and free from snow or ice or other obstruction, and also provides that the superintendent of streets should repair any sidewalk when the owner of the property neglected to repair the same for a fixed number of days after the service upon him of a written notice to do so, and that the superintendent should collect the expense of such repair from the owner of the property, it only imposes upon the lot-owner a statutory liability for the expense of such repairs. It does not directly and specifically make him liable for any damages in case of personal injury to persons from a failure to keep such sidewalks in repair, and the municipality, though it may in an action be held liable to the person injured and pay the same, cannot maintain the action against the lot-owner for indemnity.²

¹ *Port Jervis v. Bank*, 96 N. Y. 550; *Chicago v. Robbins*, 2 Black, 418; *City of Brooklyn v. Railroad Co.*, 47 N. Y. 486. In *Lowell v. Railroad Corp.*, 23 Pick. 34, it was said that "if the defendants had been prosecuted instead of the town, they must have been held liable for damages, and from this liability they have been relieved by the plaintiffs. It cannot, therefore, be controverted that the plaintiffs' claim is founded in manifest equity. The defendants are bound in justice to indemnify them, so far as they have been relieved from a legal liability, and the policy of the law does not, in this instance, interfere with the claim of justice."

² *City of Rochester v. Campbell*, 123 N. Y. 405; s. c., 25 N. E. Rep. 937; *Moore v. Gadsden*, 93 N. Y. 12; *Wenzlich v. McCotter*, 87 N. Y. 127.

Judge Dillon says:—"The liability of a city or town for actionable defects extends, as already remarked, to sidewalks, they being deemed to constitute part of the street. When the charter of a city gives it the power to cause sidewalks to be kept in repair and makes adequate provision for so doing, the exercise of the power according to the prevailing judgment of the courts follows as a duty. In such case the city is liable for actionable defects in sidewalks, although the charter requires the lot-owner to build the sidewalk and imposes a penalty for his failure in this regard. The abutting owner is not bound to keep the sidewalk in repair, unless by virtue of the requirement of a statute, and is not responsible to travelers for defects therein not caused by himself." Dil-

§ 1214. **Proper evidence in actions for injuries.**—In an action for injuries received by falling into a hole in a sidewalk, evidence of the general condition of the sidewalk is admissible to show the knowledge of the defects by the city; also evidence of conversations with a sidewalk commissioner before the accident, relative to the condition of the walk. Evidence also that another person had fallen at the same place is admissible as tending to show the defect. Evidence that a defective sidewalk is on a public street is sufficient to show that the city has assumed control of it in the absence of evidence to the contrary. Notice to one employed by a city to look after the repairs of a sidewalk is notice to the city.¹ A city cannot defend such an action on the ground that the injury was the result of coming in contact with an obstruction in the street, and that it had a contract with an electric light company for lighting the streets, and if the light company had performed its duty the accident would not have occurred.² Where the injury has resulted from a house which was being removed in the streets by permission of the authorities, evidence in such an action of the negligent manner in which the work of moving the building was done is competent against the city.³

lon on Munic. Corp. (4th ed.), § 1012; *Hill v. City of Fond du Lac*, 56 Wis. 242; s. c., 14 N. W. Rep. 25; *Knupfle v. Ice Co.*, 84 N. Y. 488; *Weller v. McCormick*, 47 N. J. Law, 397; s. c., 1 Atl. Rep. 516; *Kirby v. Association*, 14 Gray, 249; *Flynn v. Canton Co. of Baltimore*, 40 Md. 312; *Heeney v. Sprague*, 11 R. I. 456; *City of Hartford v. Talcott*, 48 Conn. 525; *Eustace v. Johns*, 38 Cal. 3; *In re Goddard*, 16 Pick. 504. In *Keokuk v. District of Keokuk*, 53 Iowa, 352; s. c., 5 N. W. Rep. 503, it was held that "where a lot-owner is required by the city to construct or repair a sidewalk, it is simply a method of exercising its power of taxation by which he is made the agent of the city to expend the amount of the tax,

and the responsibility for the performance of the work remains where the authority to control it is found." *Taylor v. Railroad Co.*, 45 Mich. 74; s. c., 7 N. W. Rep. 728.

¹ *Smith v. City of Des Moines* (Iowa, 1892), 51 N. W. Rep. 77, as to the first point. See, also, *Armstrong v. Town of Ackley*, 71 Iowa, 76; s. c., 33 N. W. Rep. 180; *McConnell v. City of Osage*, 80 Iowa, 293; s. c., 45 N. W. Rep. 550; *Munger v. City of Waterloo* (Iowa), 49 N. W. Rep. 1028.

² *Hayes v. City of West Bay City* (Mich., 1892), 51 N. W. Rep. 1067; *Southwell v. Detroit*, 74 Mich. 438, 445, 450; s. c., 42 N. W. Rep. 118.

³ *Hayes v. City of West Bay City* (Mich., 1892), 51 N. W. Rep. 1067.

§ 1215. **Power of park board over streets.**—The statute providing for a system of public parks and parkways of one of the principal cities of Minnesota has been held not to authorize the board created by it to vacate or close or exclude any class of vehicles from any street except such as might run through any tract of land taken for a park; and the board could not acquire that power over a street by merely widening it by acquiring title to a strip on each side.¹

§ 1216. **Extent of control of streets.**—The Pennsylvania Supreme Court has said:—“Among the subjects of municipal control is that of the opening, vacating and management of streets and alleys. The city or borough may decide when and where it will open streets, what shall be their width, and how much of that width shall be devoted to a carriage-way and how much to footwalks. It may say where trees shall be planted within the street limits, where and how hitching posts shall be set, telegraph poles erected, or passenger railways built. Its decisions in such matters may subject a few persons to some inconvenience, or possibly to some substantial loss, but it has the power to decide on such subjects. The footways no less than the carriage-ways are under mu-

¹ State v. Waddell (Minn., 1892), 52 N. W. Rep. 213, reversing the conviction of one charged with violation of an ordinance of the park commissioners closing an avenue boulevard for traffic purposes. The court said:—“The legislature had in mind that in case of a tract of land appropriated for a park in order to make it most available for that purpose, it might be necessary to close or vacate roads or highways running through it. The power given by the [statute] takes such roads or highways out from the control of the common council—the body that has the general supervision and control over roads, highways and streets in the city. We are not to suppose the legislature intended to do that any further than is expressed in the act

or implied, because necessary to accomplish its purposes. The power to exclude from any street taken possession of by the board any kind of travel, or travel with any vehicle ordinarily used for travel, can only be found in the power given to close or vacate. And while the board may probably make a parkway of any established street, and may regulate the use of and the travel upon such parkway, it cannot vacate or close it, nor exclude from it vehicles which otherwise have a right to travel upon it. If it could, it might take possession of any street in the city, and exclude from it all vehicles except those used for purposes of pleasure—a power that cannot well be implied from the provisions of the [statute].”

municipal control, and the authorities may determine the extent to which the walks and pavements may be obstructed by cellar doors, door-steps, awnings, projecting windows, cornices and the like. This power must be exercised by regulations that are general and uniform; that are reasonable and certain; and that are in conformity with the constitution and laws. When so exercised it is binding on all the inhabitants of the municipality."¹

§ 1217. Grant of use of streets to railway companies.—

Where a county road has been included within the limits of an incorporated town and the municipal authorities have assumed control of it, it has been held that they may, under the general powers conferred by West Virginia statutes with references to streets, alleys, etc., authorize a railroad company to use a portion of such road for the purpose of constructing its railway along the same in accordance with the statute which provides for such construction.² It has been held in Kentucky that the power to grant to a railroad company the right of way over and along its public streets is not conferred upon a council by a charter provision that they shall have "exclusive control of the streets, sidewalks, lanes, alleys, market places and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair," as such a grant would be an appropriation or use of the streets for a purpose not contemplated when the charter was granted.³ And it has been held in New Jersey that a city council of one of its cities had no power by ordi-

¹ *Livingston v. Wolf*, 136 Pa. St. 519, which sustained an ordinance prohibiting the construction of "any jut or bulk window" projecting into the street more than twenty-eight inches, as a reasonable regulation, and general in its application. See, also, *Paul v. Carver*, 26 Pa. St. 223; *Commonwealth v. Rush*, 14 Pa. St. 186; *Barter v. Commonwealth*, 3 Pen. & W. 259; *Appeal of City of Philadelphia*, 78 Pa. St. 33; *City of Alleghany v. Zimmerman*, 95 Pa. St. 287; *Commonwealth v. Hauck*, 103 Pa. St. 536; *In*

re Ruan Street, 132 Pa. St. 257; s. c., 19 Atl. Rep. 219. That courts must judge of the reasonableness of such ordinances, see *Kneedler v. Norris-town*, 100 Pa. St. 368. That the action of the municipality must be general and bear equally upon its citizens, see *Reimer's Appeal*, 100 Pa. St. 182.

² *Yates v. Town of West Grafton* (West Va.), 12 S. E. Rep. 1075.

³ *Ruttles v. City of Covington* (Ky.), 10 S. W. Rep. 644.

nance to confer upon a railroad company a right to occupy exclusively twelve feet of a street by the erection thereon of a freight platform and roof under the power to pass ordinances to regulate or prevent the use of streets for any other purposes than public travel.¹ An ordinance of a city in Colorado granting the right of way to a railroad company through certain of its streets therein designated has been held not invalid for want of legislative authority, as under the constitution of the State any railroad company may construct a railroad between any designated points in the State, and under the charter of the city its city council may regulate the location of railroad tracks, the use of locomotives, the construction of public crossings and the speed of trains. Such use of the streets was clearly contemplated by these provisions and the ordinance passed was a valid license to use the streets designated.² And the fact that a street has been paved with asphalt, the cost of which was assessed against the abutting owners, has been held not to affect the right of the municipal authorities to consent to the laying of street-car tracks in such street.³

§ 1218. *The same subject continued.*— Under the general control of the streets and alleys given to cities of the second class by the Kansas statutes, it has been held that the city council had the power to grant to a street horse railway company permission to construct and operate a street railway in the streets of the city.⁴ Brewer, J., in a later case in the federal court, commented at large upon the ruling, in which he, as one of the judges of the Supreme Court of Kansas, had written the opinion, and held that where the legislature of Kansas had not given to its cities the power of granting an exclusive privilege of occupying the streets with railroads, nor the right to contract away its continuous control of the streets and its future judgment of the needs of the public in those streets, a city could not surrender the occupation of its streets for railroad purposes to individuals for a series of

¹ *State v. Jersey City* (N. J.), 18 Atl. Rep. 586.

² *Denver &c. R. Co. v. Domke*, 11 Colo. 247; s. c., 17 Pac. Rep. 777.

³ *Lockhart v. Craig St. R. Co.* (Pa.), 21 Atl. Rep. 26.

⁴ *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.* (1884), 31 Kan. 660; s. c., 8 Pac. Rep. 284.

years. The judge made this distinction:—The ruling by the Kansas Supreme Court was, simply, that having a general control and supervision of its streets, a city might permit a street railroad, as a street railroad comes within the ordinary scope of the use of a street as a street. This is a mere street regulation or license. But to allow such a use exclusively for a series of years would give it the dignity of a contract, and there must be special legislation for that.¹ Where a railroad company has been granted the right to occupy a street of a city with its tracks and has built the same and then abandoned the road, as this was but a license from the city, it may confer the right on another company without first procuring a decree of forfeiture.²

§ 1219. Use of streets by railroad companies.—The first use of a street is for the ordinary travel over it; the right of a railroad company to operate its trains across it is subordinate to the use of the general public.³ The legislature may authorize the laying of a railroad track in the street of a city, but the track must be laid in the manner authorized. So if there be a requirement in the statute authorizing such laying of the track that it must “be so constructed as not to hinder or prevent the public from using the street,” if the character

¹ *Jackson County Horse R. Co. v. Interstate Rapid Transit Ry. Co.* (1885), 24 Fed. Rep. 306, refusing an injunction against an elevated railroad in the same street where the horse-car railroad was already constructed and in operation. See, also, *Davis v. Mayor &c.*, 14 N. Y. 506; *People v. Kerr*, 27 N. Y. 188; *Mayor v. Railroad Co.*, 26 Pa. St. 355; *Commonwealth v. Railroad Co.*, 27 Pa. St. 339.

² *Galveston &c. Ry. Co. v. G. C. S. Ry. Co.*, 63 Tex. 529. In Texas the right of a railroad company to occupy any particular street with its road-bed is entirely dependent upon the consent of the city authorities. To this end the local authorities have free control and management of the streets and may or may not consent to their use for such purpose. *Const. Tex.*,

art. 10, § 7; *Tex. Rev. Stats.*, art. 4173; *Indianola v. Gulf &c. Ry.*, 56 Tex. 599. As to the power of a council to withdraw its consent to such a license and by conferring the license upon another company to occupy its streets with its road-bed, and the presumption that it had withdrawn its consent by thus conferring the privilege upon another company, see, also, *City of Detroit v. Detroit City Ry. Co.*, 37 Mich. 558; *Street Ry. Co. v. West Side Ry. Co.*, 7 Am. & Eng. R. R. Cas. 95; *New York & Harlem Ry. Co. v. Railway Co.*, 50 Barb. 285; *Market St. Ry. Co. v. Central Ry. Co.*, 51 Cal. 586.

³ *Houston &c. Ry. Co. v. Carson* (1886), 66 Tex. 345; *s. c.*, 1 S. W. Rep. 107.

of the street be such that it could not be constructed without hindering the public from using the street, then it cannot be laid therein, no matter how important it should be to the company to use the street. A city has no power to authorize such a use of a street dedicated for that purpose as will destroy its use as a public thoroughfare. And one owning property sustaining special damages by reason of an appropriation of a street to a railroad company for track purposes can maintain injunction to restrain such use.¹ And where tracks have been laid in the streets of a city by authority of the legislature, such authority does not go to the extent of allowing these railroad companies to so use the street as to allow, for instance, their loaded and unloaded cars to stand upon the tracks so as to become offensive to the citizens occupying property contiguous to the street. They can only use them for moving their cars to and fro; the street cannot be used for yard purposes or for the purpose of shifting cars and making up and breaking up trains in the conduct of its general business. And one having the right of possession, but not the absolute ownership, of real estate abutting upon such streets may maintain an action for personal annoyances resulting from a nuisance committed in such an unlawful and unreasonable use of a street by a railroad company.²

§ 1220. Extension of track in streets.—The Supreme Court of Pennsylvania affirmed a decree of a presiding judge for continuing an injunction restraining a city from interfering with the extension of the track of a street-railroad company through other streets, it being urged only that it was being done with a view to lease its road, etc., to another company. The presiding judge based his action on the fact that the company had received its charter from the legislature,

¹ *Dubach v. Hannibal &c. R. Co.* (1886), 89 Mo. 483; s. c., 1 S. W. Rep. 86. As to the power of the legislature of Missouri to authorize the use of the streets of a city for railroad tracks, see, also, *Porter v. Railroad Co.*, 33 Mo. 128; *Tate v. Railroad Co.*, 6 Mo. 158. As to a city's lack of authority to authorize such use of

a street, and the right of property owners to have injunction, see *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 124.

² *Hopkins v. Baltimore &c. R. Co.* (1888), 6 Mackey, 311; approving *Neitzey v. Baltimore &c. R. Co.*, 5 Mackey, 34.

conferring upon it full power to extend its road through any of the streets of the city to any point within its limits, and not dependent upon the assent of the city authorities, its charter having been granted before the provisions of the constitution and subsequent legislation that the construction of street railways should be subject to the consent of local authorities.¹

§ 1221. Power over streets used by railroads.— A city by permitting a railroad company to use one of its streets by building its track thereon and running its cars through it does not part with its right to control such street, for, without some special legislative authority, it cannot make any such grant to a railroad company, if the effect of such grant would be to relinquish its own control over such street, or to abandon its duty to keep the same in repair. The privilege of a railroad company to lay down and use a track in a street of a city is not exclusive but must be exercised in common with the general public. The streets are held in trust for the public use, and are public for all purposes of free and unobstructed passage. For those purposes a city may improve and control

¹ *Harrisburg City Pass. Ry. Co. v. City of Harrisburg* (Pa., 1892), 24 Atl. Rep. 56. See, also, *Railway Co. v. Williamsport*, 120 Pa. St. 1; s. c., 13 Atl. Rep. 496; *Borough of Millvale v. Railway Co.*, 131 Pa. St. 1; s. c., 18 Atl. Rep. 993. The judge, in *Harrisburg City Pass. Ry. Co. v. City of Harrisburg*, *supra*, said:—“It is true that the railroad company took the privilege to build and operate its railway subject to such reasonable regulations as the city might enact for the common good of all those who might travel its streets. *Northern Liberties v. Gas Co.*, 12 Pa. St. 318; *Railway Co. v. City of Philadelphia*, 58 Pa. St. 119. It is also the law that when a corporation accepts the grant of a franchise upon a highway over which a municipality possessed a general power of regulation and control for public purposes, it ac-

cepts its special privileges upon the implied condition that they shall be held subject to the reasonable and necessary exercise of the general powers of the municipality. *Railway Co. v. City of Philadelphia*, 10 Phila. 70. But, while regulations may be thus imposed upon the exercise of its franchise of a passenger railway occupying the streets of a city or borough, they must be reasonable in character. Ordinances which conflict with the statutes of the commonwealth are invalid. They must not attempt to nullify corporate rights. They should have in view a common benefit. When ordained with reference to a street highway they should have due regard for all who may use it.” The decision was made upon the authority especially of *Railway Co. v. Easton*, 133 Pa. St. 505; s. c., 19 Atl. Rep. 486.

them, and adopt all needful rules and regulations for their management and use, but cannot alien or otherwise dispose of them.¹

§ 1222. The same subject continued.—The permission given a street-railway company to occupy streets is subordinate to a municipality's statutory and corporate powers respecting the use, control and regulation of streets. "The right of public supervision and control of highways results from the power and duty of providing and preserving them. The charter of a city generally commits the regulation, supervision and control of its streets to the common council. It empowers the council to improve the same and determine the nature and details of such improvement. The council is given the power to control, prescribe and regulate the manner in which the streets shall be used and enjoyed. These powers are held in trust for the public benefit, and cannot be surrendered or delegated to private parties. All franchises granted or contracts made with reference to the use of streets must be made, not only with due regard to their lawful and proper use by others, but subject to the exercise by the municipality of the foregoing powers. A city is not under obligation to conform its treatment of its streets to the construction of a railroad company's road-bed, but, on the contrary, the company must conform the construction of its road-bed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers respecting the use, control, regulation and improvement of its streets. Street railways occupy public streets subject to the use of such streets by the public, subject to such burdens as may be made necessary by

¹ *Chicago &c. R. Co. v. City of Quincy* (Ill., 1891), 27 N. E. Rep. 192, in which the right of the city to order such a street to be paved was sustained, notwithstanding it might put the railroad company to some inconvenience. The court said:—"It frequently happens that the business of the individual citizen is injured and interfered with by the construction of a street improvement, but no greater obligation rests upon him

than upon the railroad company to submit gracefully to such annoyance. On such occasions the owners of railways, like other parties desirous of using the street, must endure a temporary inconvenience for the sake of a permanent advantage." *Railroad Co. v. Wakefield*, 103 Mass. 261; *Quincy v. Jones*, 76 Ill. 231; *Kreigh v. City of Chicago*, 86 Ill. 407; *City of Bloomington v. Bay*, 42 Ill. 503; *Watson v. Tripp*, 11 R. I. 98.

reason of the improvements of such streets, and subject to such changes in the construction of road-beds as improved and changed conditions may demand.”¹

§ 1223. Regulating speed of cars.—A municipal corporation may regulate within its limits the running and stopping of cars propelled by steam, by virtue of its power over the streets and to protect the safety of citizens and their property. In the absence of any express authority in its charter, a right to pass ordinances as to the speed with which such cars should be run through the streets would ensue by virtue of its general supervision over the police of the city. And such an ordinance would be applicable where the track is located on the uninclosed private property of the company.² A learned author says on this subject:—“It has been held that a statute giving power to the common council of a city to regulate the running of cars within the corporate limits authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city. We would entertain no doubt of the right of the municipal authorities of a city, or large town, to adopt such an ordinance without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions.”³

¹ These principles are declared in the opinion of McGrath, J., for the Supreme Court of Michigan as governing that court in *City of Detroit v. Ft. Wayne & E. Ry. Co.* (Mich., 1892), in which case they ordered a writ of *mandamus* to issue to compel the authorities of the railway company to remove the projecting ends of the ties upon which its tracks were laid, as that was necessary to protect the concrete which was to be used in the plan of repaving the streets.

² *Merz v. Missouri Pac. Ry. Co.* (1886), 88 Mo. 672; s. c., 1 S. W. Rep. 382. This doctrine is sustained by *Buffalo & Niagara Falls Ry. Co. v. City of Buffalo*, 5 Hill, 209; *Whitson v. City*

of Franklin, 34 Ind. 393; *Chicago & C. Ry. Co. v. Haggarty*, 67 Ill. 113; *Cooley's Const. Lim.* (5th ed.) 712; 2 *Dillon on Munic. Corp.*, § 713; *Neier v. Missouri Pac. Ry. Co. (Mo.)*, 1 S. W. Rep. 386, 387.

³ 2 *Redfield on Railways*, 577-8. There has been no general grant of police powers by the legislature of Louisiana to police juries, and it has been held in that State, that, in the absence of a grant to that end, such corporate authorities are not authorized to pass an ordinance regulating the speed of cars running through the villages of their parish. *State v. Miller* (1889), 41 La. Ann. 53; s. c., 7 So. Rep. 672.

§ 1224. **The same subject continued.**— With a limitation, the whole matter of regulating the speed of trains of cars running through the various cities organized under the general incorporation act of Illinois is left by that act to the sound discretion of the municipal authorities. Such discretion, however, is not absolute, but is subject to the limitation that the ordinance adopted in such matters must be reasonable. Upon this question of reasonableness, it has been held that, where one railroad runs through a densely populated part of a city, where a high rate of speed would be extremely dangerous to persons and property, and another railway runs through a portion of the same city where there are but few inhabitants, and where it is improbable that injury will happen to any person who is in the exercise of ordinary care, an ordinance making a discrimination as to the speed at which the trains of the two roads may be run can hardly be said to be unreasonable. But where no such disparity of circumstances is shown, making it necessary to apply different regulations to the different roads, an ordinance which limits the speed of the trains of one road and leaves the other to run through the city without such limitation, would be unreasonable, and therefore void.¹

§ 1225. **Regulating trains at crossings.**— Ordinances of a city in Louisiana, requiring railroad companies to place watchmen with prescribed signals at all points where their tracks intersect streets on which street-cars are running, and which imposed imprisonment on the person in charge of a train who crosses such street without being signaled as therein provided, have been held to be a valid exercise of the power conferred

¹ *City of Lake View v. Tate* (1889), 130 Ill. 247; s. c., 22 N. E. Rep. 791. As to ordinances making unjust discriminations, see, also, *Tugman v. City of Chicago*, 78 Ill. 405; *City of Chicago v. Rumpff*, 45 Ill. 90; *Dillon on Munic. Corp.*, §§ 319, 328. A municipal corporation, under authority given it to regulate the use of its streets by street-cars "so as to prevent injury and inconvenience to the public, has no power to suspend, alter or change the general statutes of the State regulating the running of railroads. Therefore, an ordinance prohibiting the blowing of steam-whistles within a city would be void so far as it conflicts with a law of the State imposing upon railroad companies in general the duty of blowing whistles at crossings." *Katzenberger v. Lawo*, 90 Tenn. 235; s. c., 16 S. W. Rep. 611, a street "dummy" road held to be a "railroad" and subject to the State law.

on it by its charter to "authorize the use of the streets for horse or steam railroads and to regulate the same."¹ And the Louisiana courts refused to interfere with the discretion vested in the municipal authorities as to the mode and means of regulating the use of its streets by railway companies unless they are manifestly unreasonable and oppressive.² The charter of a city authorizing the adoption of ordinances to prevent the incumbering of streets with carriages authorizes an ordinance to prevent the obstruction of streets by railroad cars; and an ordinance prohibiting the stopping of railroad cars or locomotives on a street crossing for the switching of cars has been held not to be *prima facie* unreasonable and void.³ Courts are not justified in declaring such enactments unreasonable and therefore invalid unless their unreasonableness is clearly shown.⁴

§ 1226. Use of snow-plows regulated.—In a New York case it has been held that the provisions of a street-railway company's charter, that it shall run its cars as often as the convenience of passengers shall require, and that the mayor and common council shall do no act to hinder, delay or obstruct the operation of the road, did not authorize it to throw the snow from its track for the purpose of keeping it open upon the street along its line so as to impede or prevent public travel thereon. The city authorities, therefore, had the power to prevent this street-railway company from using

¹ State v. Cozzens (1890), 42 La. Ann. 1069; s. c., 8 So. Rep. 268.

² State v. Cozzens (1890), 42 La. Ann. 1069; s. c., 8 So. Rep. 268.

³ City of Duluth v. Mallett (1890), 43 Minn. 204; s. c., 45 N. W. Rep. 154.

⁴ Knobloch v. Chicago &c. Ry. Co., 31 Minn. 402; s. c., 18 N. W. Rep. 106. A charter of a city authorizing the passage of such ordinances as shall appear to its council requisite and necessary for the security, welfare and convenience of its inhabitants, and for preserving health, peace and good government within its limits, authorizes the coun-

cil to pass an ordinance requiring street-railroad companies to keep their tracks watered so as to lay the dust, and impose a fine for failing so to do. Even if a railroad company has not, as in a case in Georgia it had, submitted itself to the police regulations and ordinances of the city on entering it over tracks laid in its streets, it would be subject to it. Nor is an ordinance of this kind so partial and wanting in generality as to vitiate it. City & Suburban Ry. Co. v. Mayor &c. of Savannah (1886), 77 Ga. 731. See, also, *In re Goddard*, 16 Pick. 504, 506, 510; *Railroad Co. v. Richmond*, 96 U. S. 521.

snow-plows in such a way as to throw snow on the streets adjacent to its track, and it follows that it has the power to permit the mayor to license the company to do so. And a provision in such an ordinance, requiring the company not only to remove the snow thrown up by the plow, but also to reduce the snow upon the street adjacent to the track to such a level as would make it convenient for all vehicles to approach the sidewalk, and to make the whole width of the road safe for travel, within twenty-four hours, was not unreasonable, and as the council had the right to restrain the use of snow-plows altogether, it had the right to impose the terms on which they might be used.¹

§ 1227. Measure of damages in appropriating a railroad right of way.—The Supreme Court of Michigan have declared this rule as to the compensation to be made to a railroad company for crossing its right of way for street purposes:—The compensation to be made in such case not only includes the use of the land occupied by the street for such crossing, but any extra expense created by the use of the right of way for the street in the ordinary use of the company's road, and such other damages as it may sustain for injury to its track, right of way and franchise, occasioned by the crossing, and which may be properly considered as the natural, necessary and proximate cause thereof. But this rule will not include expenses made necessary in order to comply with the police regulations of the State or municipality, but such damages only as arise in making the structural changes necessary to comply with statutory regulations, and which must necessarily continue in the future operation of the company's road.²

¹ *Broadway & Sev. Av. R. Co. v. Mayor &c.* (1888), 1 N. Y. Supl. 646. See, also, *Thorpe v. Railroad Co.*, 27 Vt. 140; *People v. Squire*, 107 N. Y. 593; s. c., 14 N. E. Rep. 820, as to the duty of a city in the exercise of its police power to protect the vested rights of abutters upon its streets, etc. The passage by a city council of an ordinance prohibiting the obstruction of streets used by a railroad company is not precluded by a license to

that company to use those streets as the company might require in crossing them, in the construction of its tracks, switches, turn-tables, etc., but that such occupation should be with as little inconvenience to the public as possible. *St. Louis &c. R. Co. v. City of Belleville*, 122 Ill. 376; s. c., 12 N. E. Rep. 680.

² *City of Grand Rapids v. Grand Rapids &c. R. Co.* (1887), 66 Mich. 42; s. c., 33 N. W. Rep. 15; *Toledo;*

§ 1228. Danger signals.—It is not the duty of a city to provide means of access from private property to its streets, nor is it liable for a failure to guard its streets from approach at points where such approach is dangerous.¹ A city is under no legal obligation to provide danger signals along an excavation in a public street, as to one traveling outside of the street, or except at the crossings or intersection of such street by other streets or highways.²

§ 1229. Contract rights in streets.—Statutes giving the common council of a city exclusive jurisdiction over the streets of the city do not take from the courts the authority to decide controversies concerning property rights. For instance, where a right to use a street has been acquired pursuant to statute, and under a license from the municipality, it is in the nature of a contract right, and such municipality cannot destroy nor materially impair it. The courts must decide all controversies in which such rights are involved.³ All such

&c. Ry. Co. *v.* Detroit &c. R. Co., 62 Mich. 564; Grand Rapids *v.* Grand Rapids &c. R. Co., 58 Mich. 641; People *v.* Lake Shore &c. Ry. Co., 52 Mich. 277; Mass. Cent. R. Co. *v.* Boston &c. R. Co., 121 Mass. 124; Com. *v.* Boston &c. R. Co., 3 Cush. 25; Flint &c. R. Co. *v.* Detroit &c. R. Co., 64 Mich. 350.

¹ See Goodin *v.* City of Des Moines, 55 Iowa, 87; s. c., 7 N. W. Rep. 411; Zettler *v.* City of Atlanta, 66 Ga. 195; Young *v.* District of Columbia, 3 MacArthur, 137.

² Mulvane *v.* City of South Topeka, 45 Kan. 45; s. c., 25 Pac. Rep. 217, in which the city was held not liable in damages for an injury to one who, in driving over a vacant lot or tract of ground, was precipitated over an embankment into the street and injured. The court said:—"There was no obligation resting upon the city to provide a way over private property to its public streets and avenues; and the fact that the ground over which the plaintiff passed had been

used by the public for a number of years would not cast upon the city any duty to erect barriers, or place danger signals upon such ground, unless the city had full and complete control over the same as a part of the public streets of the city." In Kansas City *v.* Birmingham, 45 Kan. 212; s. c., 25 Pac. Rep. 569, an action for damages for personal injuries occasioned by a person falling into an excavation in front of a building in course of construction by a contractor on the streets of the city, it was held not error to instruct the jury that if the contractors of the building being erected provided and maintained reasonable safeguards or signals to protect persons traveling along the sidewalk in front of the same, this would relieve the city from liability the same as if such guards and signals had been placed and maintained there by the city.

³ Williams *v.* Citizens' Ry. Co. (Ind., 1891), 29 N. E. Rep. 408, in which it was held that where a city council

rights, however, are subordinate to the paramount power, usually denominated "the police power," for that power cannot be annihilated by contract.¹

§ 1230. When obstructions allowable.—Judge Dillon says:—"It is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislation or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations. The carriage and delivery of fruit, grain, seeds, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public, and so of the improvement of adjoining lots by digging cellars, by building, etc.; this may occasion a reasonable necessity for using the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as they are, reasonably necessary. There need be no absolute necessity; it

failed to prevent persons moving a building along a street and thereby interfering with the operation of an electric street railway by cutting down its wires and poles, such interference may be restrained by injunction. See, also, *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369; s. c., 24 N. E. Rep. 1054; 26 N. E. Rep. 898; *People v. Chicago &c. Ry. Co.*, 18 Ill. App. 125; *People v. O'Brien*, 111 N. Y. 1; s. c., 7 Am. St. R. 684; *State v. Noyes*, 47 Me. 189; *Commonwealth v. Proprietors &c.*, 2 Gray, 339; *People v. Sturtevant*, 9 N. Y. 263; s. c., 59 Am. Dec. 536; *Davis v. Mayor*, 14 N. Y. 496; s. c., 67 Am. Dec. 186; *Milhan v. Sharp*, 27 N. Y. 611; s. c., 84 Am. Dec. 314; *City of Detroit v. Detroit &c. R. Co.*, 43 Mich. 140; *Commonwealth v. Essex Co.*, 13 Gray, 239.

¹*Jameson v. Oil Co.*, 128 Ind. 5; s. c., 28 N. E. Rep. 76; *Westbrook v. New York &c. R. Co.*, 57 Conn. 95; s. c., 16 Atl. Rep. 724, in which it was held that the enactment of a statute abolishing grade crossings was a valid exercise of the police power. It was said by the court in the course of opinion that:—"We might stop here; but will add that the act in question is an exercise of the police power of the State. Its object is to change or remove certain conditions, lawful in themselves, but which have become a source of danger to life and property. The remedy consists in requiring those charged with the duty of maintaining highways to change the conditions, and hereafter discharge their duties in such a manner as to avoid danger."

suffices that the necessity is a reasonable one. But this will never justify the leaving of the street or way in an unsafe and dangerous condition or its use in an unreasonable manner or for an unreasonable time.”¹ The Supreme Court of Texas has applied this doctrine and held that one who contracts to build a State capitol in a city, for instance, has no right, without the consent of the municipal authorities, to lay and operate a steam railway in the streets for the purpose of transporting materials, although they are of such a nature that the railway is a necessity; and, therefore, the council in granting the privilege may regulate the manner of using the road, prohibit its sale or transfer, and provide that the contractor shall be primarily liable for all injuries to persons and property arising from the construction and use of the road for which the city may be liable.²

§ 1231. The same subject continued.— And where a city has granted a right to build a street railroad for such a purpose to be used by the grantee while building a State capitol, an agreement by the grantee giving a subcontractor a right to use the road while engaged in erecting such building was not a violation of the condition, so as to forfeit the privilege and render the road a nuisance.³ The effect of requiring a contractor to be liable for injuries resulting from the construction and use of such road, in an ordinance granting him the right to construct the railway in its streets, is to make the contractor primarily liable for injuries for which the city would be liable; it gives no right of action for any injury caused by the negligence of a subcontractor to whom such a road may have been transferred.⁴ Where such contractors are required to give bond for the removal of such road at a certain time, as well as all rubbish, etc., the contract is to indemnify

¹ Dillon on Munic. Corp., § 730.

² Taylor v. Dunn (Tex., 1891), 16 S. W. Rep. 732.

³ Taylor v. Dunn (Tex., 1891), 16 S. W. Rep. 732.

⁴ Taylor v. Dunn (Tex., 1891), 16 S. W. Rep. 732. See, also, Becker v. Keokuk Water-works, 79 Iowa, 419; s. c., 44 N. W. Rep. 694; Clark v.

City of Des Moines, 19 Iowa, 212;

McPherson v. Foster, 43 Iowa, 57;

Blake v. Ferris, 5 N. Y. 48; City of

Kansas v. O'Connell, 99 Mo. 357; s. c.,

12 S. W. Rep. 791. Cf. Water Co. v.

Ware, 16 Wall, 566. The correctness

of the decision in this case the Texas

Supreme Court respectfully doubts.

the city for any expenses it may incur in restoring the streets to their original condition, and does not inure to the benefit of any person who may have been injured by the negligence of a subcontractor operating the road.¹

§ 1232. Right to build a railroad in street — Particular charter provision.— An ordinance of a city declaring that a wharf company whose charter provided that it might construct a railroad along a certain street in that city and make switches to its wharves which were north of that street might have and exercise all the rights, privileges and powers conferred by its charter, provided the company so used its privileges “as not to obstruct the free passage of the streets on land south of” the street named, confers upon the company no right to construct switches on the south side of its main track on such street.² The fact that such a company improved and reclaimed the street, which it was using for its railroad track, did not give the company any privileges not granted by its charter or the city ordinance, nor deprive the city of its power over that street.³

¹Taylor v. Dunn (Tex., 1891), 16 S. W. Rep. 732.

²Galveston Wharf Co. v. Gulf &c. Ry. Co. (Tex., 1891), 17 S. W. Rep. 57. The court said: — “Neither the legislature nor the city conferred on that corporation the exclusive use of the street for railroad or any other purpose. Gulf City St. Ry. Co. v. Galveston City Ry. Co., 65 Tex. 502. The evident and sole purpose of the act was to enable the corporation to construct and operate a railroad in connection with the wharves lying north of it. It was not contemplated that authority to construct the main road along the street would include authority to construct switches, turnouts and side-tracks, and therefore they were expressly provided for; but such provision was made for them only on the north side of the

road, and in connection with its own and another wharf on that side of the track occupied by its main track.” As to proper construction of such contracts, see, also, 2 Parsons on Contracts, 506, 507, 516; Broom’s Legal Maxims, 626; Bridge Co. v. Improvement Co., 13 N. J. Eq. 81.

³Galveston Wharf Co. v. Gulf &c. Ry. Co. (Tex., 1891), 17 S. W. Rep. 57. Nor did the fact that the wharf company constructed switches and turnouts not authorized by its charter, and without objection, give it a vested right in the street, and a court, in such a case, may order the same to be taken up and removed at the instance of a railroad company having authority to use the street for the same purpose. Galveston Wharf Co. v. Gulf &c. Ry. Co. (Tex., 1891), 17 S. W. Rep. 57.

§ 1233. Hay scales in streets.—The Supreme Court of Iowa as to the use of streets thus declares:—"That the title to public streets and alleys is in the city or town in trust for the use of the public is not questioned. That other uses than travel may be made of the public streets and alleys is shown by the numerous provisions of the statute granting power to authorize other uses. The paramount purpose of maintaining streets and alleys is for public travel, and all other uses must be subordinate thereto. The city or town must keep them free from obstructions, except where the use or obstruction is such as the city or town is specifically empowered to and has authorized."¹

§ 1234. Removal of shade trees.—A city may, without notice to an abutting land-owner, remove shade trees which have been growing on a sidewalk of a public street if they constitute an obstruction to public travel; and whether or not such trees are an obstruction must be determined by the proper city authorities, and their determination cannot be reviewed by the courts unless they have clearly abused their discretion.²

¹ Incorporated Town of Spencer v. Andrew (Iowa, 1891), 47 N. W. Rep. 1007, holding that the statutes authorizing the town "to provide for the measuring or weighing of hay, coal," etc., empowered it to grant to individual dealers the right to set scales in the public streets in front of their places of business in such a way as not to be an obstruction to travel. The court said:—"If it may be said that this power is not delegated by statute, it is certainly included in the trust relation and purpose under which cities and towns hold title to and exercise control over the public streets and alleys." See, also, Heath v. Railroad Co., 61 Iowa, 11; s. c., 15 N. W. Rep. 573; Davis v. Anito, 73 Iowa, 325; s. c., 35 N. W. Rep. 244, where an ordinance appointed a weigher and declared a certain scale in the town to be "city scales," under authority of the same

provision of the statute; Emerson v. Babcock, 66 Iowa, 258; s. c., 23 N. W. Rep. 656. The court in Incorporated Town of Spencer v. Andrew (Iowa), 47 N. W. Rep. 1007, held the town estopped from revoking the license for these scales, as it was granted under authority, and the licensees having acted thereupon in preparing for them, but said:—"If, from any cause, such as change in the travel or business, the construction of a scale by the town, or the condition or management of this scale, public interests require its removal, then the council may revoke the permission."

² Chase v. City of Oshkosh (Wis., 1892), 51 N. W. Rep. 560, an action by a lot-owner against the city for the destruction of trees by its authorized agents, in which the court held that, no abuse of discretion on the part of the city authorities being

It is not necessary, in order that trees shall constitute an obstruction so as to authorize their removal, that they should interrupt or stop travel.¹

§ 1235. Summary removal of obstructions.—Permanent and valuable improvements made in good faith, and where the right of the city is doubtful, are not subject to the ample power given in a city charter to its authorities to remove, in a summary manner, any nuisance, obstruction or encroachment on the streets of the city. But where a person complained of, as in the case cited in the note, maintained his fence intentionally and wilfully, after he knew that it was an encroachment, it was subject to that power to remove in a summary manner.² The mere fact that an obstruction in a street by the continued use of which after dedication the public had established a right to, not inconsistent with the use of the street as the wants of the public demanded, had been allowed to remain therein for more than ten years, has been held not to operate, in the absence of fraud, as an estoppel upon the city, in an action for an abatement of the nuisance, even though the obstruction may have been originally built under claim of right.³

shown, it was error to submit to the jury the question whether the trees were an obstruction.

¹ *State v. Leaver*, 62 Wis. 392; s. c., 29 N. W. Rep. 576. A permanent obstruction, such as trees standing within a sidewalk or traveled street, or stone columns which may interfere with public travel, constitutes *per se* a public nuisance, and may be summarily removed by direction of the authorities of a municipality. *Chase v. City of Oshkosh* (Wis., 1892), 51 N. W. Rep. 560.

² *Childs v. Nelson* (Wis.), 33 N. W. Rep. 587. But a fence which encroaches on a street which has been maintained for seventeen years, and not shown to "incommode the public use of the street as a highway for teams and foot passengers," and not placed there intentionally, wilfully

or maliciously, it has been held by the same court, cannot be summarily removed under a city charter authorizing the common council to abate nuisances and prevent the obstruction of streets, nor under the general statutes which impose a penalty for the obstruction of a highway and require the overseer to cause the immediate removal of the obstruction. *Pauer v. Albrecht* (Wis.), 39 N. W. Rep. 771.

³ *City of Waterloo v. Union Mill Co.*, 72 Iowa, 437; s. c., 34 N. W. Rep. 197. A Louisiana city has been held, in the exercise of its police power, to have the right of removing obstructions for public convenience and benefit, and further, it may delegate such power. *New Orleans Gas Light Co. v. Hart* (1888), 40 La. Ann. 474; s. c., 4 So. Rep. 215, sustaining the right

§ 1236. **The same subject continued.**—The mayor and city council of a city, charged with the duty of keeping the streets of the city in a condition fit for safe and convenient use, are the proper persons to file a bill to prevent either the obstruction or destruction of a street.¹ The Supreme Court of Alabama have held that permission to the owner of a building on the corner of one of the principal business streets of a city, to erect a veranda extending across the sidewalk, did not authorize him to use a part of the veranda as a water-closet for the convenience of tenants occupying the upper stories of his building; and permission to make excavations under the sidewalks, for the purpose of utilizing the basement, giving entrances to it from the streets, and affording light and ventilation, was a mere license, not having the elements of a contract, but revocable at the will of a subsequent municipal council, in the exercise of its power over the sidewalks and pavements of the city.² An ordinance forbidding the display of show-boards, placards or signs on the sidewalks of a populous city has been held not to be unreasonable.³

§ 1237. **Awnings.**—The New York Consolidation Act confers upon the common council power “to regulate the use of streets and sidewalks for signs, sign-posts, awnings, awning-

of the city to remove lamp posts put up by the Gas Light Company at certain street corners for the purpose of supplying lights to its private customers. See, also, *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 359; *Mutual Union Telegraph Co. v. Chicago*, 16 Fed. Rep. 309.

¹ *City of Newark v. Del. &c. R. Co.* (N. J.), 7 Atl. Rep. 123.

² *Winter v. City Council of Montgomery* (1887), 83 Ala. 589; s. c., 3 So. Rep. 235, sustaining the right of the council to tear down the erections, remove obstructions, or fill up excavations in or under the sidewalks, which were built or made under a revocable license granted by a former council. See, also, *Reading v. Commonwealth*, 11 Pa. St. 196;

Louisville City Ry. Co. v. Louisville, 8 Bush, 415; *Gozzler v. Georgetown*, 6 Wheat. 597. A court in New York has refused to issue an order to direct the common council of a city issuing a license under the provision of the statute that in its control of the streets it shall have power “to grant permits for the erection of booths or stands within stoop lines, the owner of the premises consenting thereto, for the sale of newspapers, periodicals or fruit only,” to revoke such license, though other articles enumerated were kept for sale. *People v. Mayor &c.* (1888), 1 N. Y. Supl. 95.

³ *Commonwealth v. McCafferty*, 145 Mass. 384; s. c., 14 N. E. Rep. 415.

posts," etc. In a different section, however, it is provided that "they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk except the temporary occupation thereof during the erection or repair of a building on a lot opposite the same. In an action to enjoin the city authorities from removing an awning or structure in front of plaintiff's place of business — a permanent iron structure covering the whole sidewalk and extending slightly over the curbstone — the Court of Appeals of New York, premising that the legislature had power to authorize structures in streets, that, without such authority, and under the principles of the common law, would be held to be encroachments and obstructions, and this power could be delegated to the governing body of a municipal corporation, proceed to scrutinize the provisions of the act to determine whether that power had actually been conferred in the case in hand. It was held that an awning was an obstruction that was intended to be excepted from the general prohibitory words. The awning, having been erected in compliance with an ordinance, could be abated only by a repeal or modification of the ordinance.¹

§ 1238. Poles for electric wires.— It has been held that a city in Pennsylvania has the right, as a matter of police regulation, to supervise and control, by such ordinances as may seem proper, the erection of poles upon and the stretching of wires along its streets.² In Missouri it has been held that where that part of an ordinance requiring a telephone company to relocate its poles was void, the part imposing a penalty on the company if it did not make the relocation was also void;³ and that an ordinance providing that one of several telephone companies should relocate its poles, and then providing that any person, company or corporation who should fail to comply with the ordinance should be guilty of a misdemeanor, was class legislation, and therefore unconstitutional.⁴

¹ *Hoey v. Gilroy*, 129 N. Y. 132, reversing s. c., 14 N. Y. Supl. 159. Cf. *Farrel v. City of New York*, 5 N. Y. Supl. 672.

² *City of Hannibal v. Missouri & Kansas Telephone Co.* (1890), 31 Mo. App. 23.

³ *Western Union Tel. Co. v. City of Philadelphia* (Pa.), 12 Atl. Rep. 144.

⁴ *City of Hannibal v. Missouri & Kansas Telephone Co.*, 31 Mo. App. 23. It has been held in Louisiana that the

§ 1239. The same subject continued.—The Supreme Court of New Jersey has, on *certiorari*, construed the statute which empowers street railways, with the consent of municipal authorities, to use electric or chemical motors or grip cables as the propelling power of its cars instead of horses, not to legalize the erection of poles and the stretching of wires in a public street as a part of a system of electrical railroading. Therefore an ordinance of the city council which purported to grant permission to erect such poles and such wires was held to be illegal.¹

right granted by a city to erect towers or supports for electric wires and cable, and to remove obstructions to such erections, cannot be contradicted by one who does not claim an exclusive or concurrent right. *New Orleans Gas-Light Co. v. Hart*, 40 La. Ann. 474; s. c., 4 So. Rep. 215. And in New Jersey that no authority under the power given one of its cities by its charter to regulate the erection "of any stoops, bay windows, area, . . . sign or post or erection, or any projection or otherwise over any street," was conferred to regulate or permit the erection of telegraph poles. *State v. City of Newark*, 49 N. J. Law, 394; s. c., 8 Atl. Rep. 128.

¹ *State v. Trenton* (N. J. Law, 1892), 23 Atl. Rep. 281. Reed, J., speaking for the court, said:—"I think it clear that it was never within the legislative design, expressly or by implication, to empower a private corporation to change or to grant power to a common council to permit such corporation to change the character of a street railroad. I mean by the term "character of a street railroad" its methods of using a public street as such use has heretofore been recognized. The placing of the tracks level with the surface of the street, the distance between the rails, the condition of the street between the

rails, have always been carefully regulated so as to prevent practically interference with the use of the entire street for all kinds of vehicles. It is because of this feature of street railways that their occupation of a street, as distinguished from that of steam railways, has been held to be but a modification of the ordinary use of streets by vehicles." This characteristic is recognized by Green, chancellor, as the ground of a decision in *Hinchman v. Railroad Co.*, 17 N. J. Eq. 80. The conclusion of Reed, J., is that the New Jersey statute "expressly grants only a right to use, with the consent of the municipal authorities, an electric machine attached to some part of a car for the purpose of transmitting electric energy into car movement. The act contains no implied grant of power to obstruct the ordinary use of a public street by posts, wires or any other apparatus designed to be used in connection with any electric motor. The common council had no power to authorize or consent to anything more than to the use of an electric motor." And an abutter upon a street, owning to the middle of the street, can use the writ of *certiorari* to test the validity of an ordinance purporting to confer power to place such posts upon his land lying in the street. *State v. Trenton*, *supra*. See,

§ 1240. **Liability growing out of obstructions.**—An allegation in a complaint for injuries resulting from a defective sidewalk that a city had exclusive authority and jurisdiction over its streets, alleys and sidewalks is a sufficient averment that this particular sidewalk is within the city and under its jurisdiction.¹ A city which by its charter is empowered to pass ordinances for the removal of all nuisances and obstructions from its streets, and to secure persons and property from danger, and by ordinance prohibits any sport that might produce bodily injury, would be liable for injuries to a person caused by coasting in the streets, unless it can show that it has used ordinary and reasonable care and diligence to abate the nuisance.²

§ 1241. **Injunction against encroachments.**—The Court of Appeals of New York sustained a city's right of action to restrain the erection of an encroachment upon a street which had been dedicated to the use of its citizens simply upon the fact that the street existed by dedication and use only;³ and

also, *State v. Paterson*, 34 N. J. Law, 163; *State v. Jersey City*, 34 N. J. Law, 390; *State v. Trenton*, 36 N. J. Law, 198.

¹ *City of Columbus v. Strassner*, 124 Ind. 482; s. c., 25 N. E. Rep. 65; *Tico v. City of Bay City*, 78 Mich. 209; s. c., 44 N. W. Rep. 52; *Ivory v. Town of Deer Park*, 116 N. Y. 476; s. c., 22 N. E. Rep. 1081; *City of La Fayette v. Larson*, 73 Ind. 367.

² *Taylor v. City of Cumberland* (1885), 64 Md. 68; s. c., 20 Atl. Rep. 1027. This case was controlled by the principles in *Mayor v. Marriott*, 9 Md. 160, in which it was held that a municipal corporation having power by its charter to prevent and remove nuisances would be discharged from responsibility for them if they could not be prevented or removed by ordinary and reasonable care and diligence; and also, that where ordinances sufficient to meet the exigencies of the case had been passed, a vigorous effort to enforce

them would amount to the requisite care and diligence. In *Gonzales v. City of Galveston* (Tex., 1892), 19 S. W. Rep. 284, an action for personal injury resulting from the falling of a pile of lumber which had been standing in a public street for a protracted period, it was held error to virtually withdraw from the jury by instructions the question of whether or not the city had been guilty of negligence in not ordering the removal of the obstruction from the street. For, as it had complete control of its streets, the duty of keeping them clear of obstructions followed, and, in a case like this, if there had been negligence in this respect on the part of the city, that negligence would have been the proximate cause of the injury.

³ *City of Cohoes v. Del. & H. Canal Co.* (N. Y. App., 1892), 31 N. E. Rep. 887, an action to restrain the laying down of an additional track in such a street.

when once shown to exist it is presumed to continue until it is shown to exist no longer;¹ for a highway, when once established, continues until discontinued by law.² It has been settled in New York that a municipal corporation can prevent by injunction the erection of a nuisance upon lands dedicated to the use of its inhabitants.³

§ 1242. **Stock running at large.**—It is well settled that municipal authorities have power, under the usual provisions of charters with respect to abatement of nuisances as well as the control of the streets, to protect the public use of the streets by the passage of ordinances to prevent the running at large of animals within the limits of the corporation, and to authorize, in carrying out this purpose, the impounding of animals so running at large and the sale of them under certain circumstances. The power is also upheld as growing out of the police power.⁴

¹ *Beckwith v. Whalen*, 65 N. Y. 322.

² *Driggs v. Phillips*, 103 N. Y. 77; s. c., 8 N. E. Rep. 514; *Adams v. Railroad Co.*, 11 Barb. 414; *Kennedy v. Jones*, 11 Ala. 63; 5 Am. & Eng. Encyc. of Law, 410.

³ *Trustees v. Cohen*, 4 Paige, 510.

⁴ *Folmer v. Curtis* (1888), 86 Ala. 354; s. c., 5 So. Rep. 678; *City of Quincy v. O'Brien* (1886), 24 Ill. App. 591; *Wilson v. Hemming*, 58 Wis. 144; *Spitler v. Young*, 63 Mo. 42; *Gilchrist v. Schmidling*, 12 Kan. 263; *Friday v. Floyd*, 63 Ill. 50; *Whitfield v. Longest*, 6 Ired. 268; *McKee v. McKee*, 8 B. Mon. 433; *Gosselink v. Campbell*, 4 Iowa, 296. The power has usually been admitted in the cases so far as such ordinances affected citizens of the corporation; but where animals belonging to non-residents have strayed into the corporation, it has been urged that the ordinances would not operate upon the animal or owner. Upon this subject the Alabama court, speaking through Clopton, J., said:—"Ordinances cannot have an extra-

territorial effect, and do not bind beyond the limits of authorized jurisdiction; but when persons, or the stock of persons, residing beyond, come within the local jurisdiction, they are liable for violation of the ordinances in the same manner as the inhabitants. Such regulations would be of little avail if restricted in their operation to the stock of the inhabitants, and the animals of those residing without the corporate limits have the privilege to run at large in the streets *ad libitum*." *Folmer v. Curtis*, 86 Ala. 354. This question has been considered in an early South Carolina case, and it was held that municipal ordinances operate upon all persons or animals coming within the corporate jurisdiction. *Kennedy v. Snowden* (1841), 1 McMul. 323. This court cites as authority the English cases, *Price v. Bartram*, Cowp. 269; *Butchers' Co. v. Moray*, 1 Bla. 370, showing that the arguments deduced from expediency and inconvenience in favor of such ordinances were not unsupported by the author-

§ 1243. Music in the streets — Salvation Army parades. It has been held that a village ordinance declaring it unlawful to go about the streets beating a drum or tambourine, or making any noise with any instrument, for any purpose, without written permission of the village president, under penalty of \$5, was authorized by the general village act giving power to make ordinances for the preservation of the public peace, and to regulate and prevent on the streets any act endangering person or property, and for the apprehension of persons unnecessarily congregating on the sidewalks or corners. And the legislature had power to authorize such an ordinance, and the ordinance has the effect of an enactment of the legislature.¹ And under the statute making it the duty of police constables to keep order in public places, and to arrest persons concerned in noisy assemblages or violating the ordinance, a police constable was held justified in arresting persons engaged in the violation of that ordinance; and the offense being committed in his presence, he was authorized to arrest without warrant.² But the Michigan Supreme Court have held an ordinance providing that "no person or persons, associations or organizations, shall march, parade or drive in or upon or through the public streets of one of their cities with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city," to be unreasonable and invalid.³

§ 1244. The same subject continued.— In Massachusetts it has been held that the board of police of a city had power by delegation from the city council, under authority from the legislature, to adopt rules for the regulation of itinerant musicians in the streets and public places of the city; and that when made, those rules were binding upon all persons without

ity of the common law. In *McKee v. McKee*, 8 B. Mon. 433, the Court of Appeals of Kentucky said that an averment in the avowry that the owner of the hogs was a resident or citizen of the town was not necessary. The same holding in *Gosselink v. Campbell*, 4 Iowa, 296.

¹*Roderick v. Whitson* (1889), 51 Hun, 620; s. c., 4 N. Y. Supl. 112.

²*Roderick v. Whitson* (1889), 51 Hun, 620; s. c., 4 N. Y. Supl. 112.

³*Frazee's Case*, 63 Mich. 396; s. c., 30 N. W. Rep. 72.

notice, and were not unreasonable and invalid in requiring the taking out of a license, for a small fee to be paid by the musician. They also held that a member of a religious organization while playing on a cornet without a license was an itinerant musician within the meaning of those rules and not protected by the fact that his act was done as a matter of religious worship only.¹

§ 1245. **Control of wharves.**—As to property held for wharves, the Supreme Court of Kentucky said in one case:—“The power of a municipal corporation to acquire land for the purpose of erecting wharves thereon and to charge wharfage is not a necessary incident of its charter, but must, like all its other powers, be derived directly from the legislature; of course to be exercised within the limits and upon conditions of the grant.² And looking to the nature and purpose of such special grant, it must be regarded as a trust involving duties and obligations to the public and individuals which cannot be ignored or shifted; for the power to acquire implies the duty of the municipality, through its governing head, to maintain and preserve wharf property for the benefit of the public, without discrimination or unreasonable charges for individual use. . . . The wharf property being so held [in trust for use of the public, and in aid of trade and commerce], the city . . . cannot transfer its title or possession, nor, according to a plain and well-settled principle, can the general council which is by statute invested with power of control, and burdened with the duty of maintaining, preserving and operating the wharves, either delegate the power or disable itself from performing the duties. It is even more manifest that the ‘Commissioners of the Sinking Fund,’ which is a distinct corporation created by that name for specified purposes, and invested with limited power, cannot hold or control the wharf property, authority to do so being nowhere given by its charter; nor would it be either provident or consistent with the purpose of its creation to so invest it.”³

¹ *Commonwealth v. Plaisted* (1889), 148 Mass. 375; S. C., 19 N. E. Rep. 224. See, on last point, *Reynolds v. United States*, 98 U. S. 145, 161; *State v. White*, 64 N. H. 48.

² *Dillon on Munic. Corp.*, § 110.

³ *Roberts v. City of Louisville* (Ky., 1891), 17 S. W. Rep. 216.

§ 1246. **Restraint of certain uses of wharves.**—Tax-payers whose private interests are subserved by the maintenance of wharves may sue to restrain by injunction the passage of an ordinance by a city council authorizing the mayor to convey property which the city holds under a legislative act, and which was paid for by taxation, for the purpose of erecting wharves thereon.¹ And the withdrawal of such an ordinance will not defeat the injunction.² *

§ 1247. **Limit upon liability growing out of control of docks.**—Though the charter of a city may make its common council commissioners of highways of the city, with power to make ordinances “in relation to the construction, repairs, care and use of the markets, docks, wharves, piers, slips and squares of the city, this does not impose upon the city the duty of removing obstructions from the river on which the wharves are located. And it will not be liable to any dock owner for damages to his business growing out of the fact that there is an obstruction — as, for instance, a sunken boat which interferes with the navigation of the stream.³ And this would

¹ *Roberts v. City of Louisville* (Ky., 1891), 17 S. W. Rep. 216. After referring to and commenting on *Oliver v. Worcester*, 102 Mass. 489; *Gas Co. v. City of Des Moines*, 44 Iowa, 505; and *People v. Dwyer*, 90 N. Y. 402, the Kentucky court said:—“In our opinion the general proposition that a court of equity may not enjoin the passage of a municipal ordinance must be confined in its application to subjects over which the corporation, in its governmental or public character, has discretionary authority; and if it be conceded that taxable inhabitants have a right to resort to equity at all times to restrain a municipal corporation and its officers from making an illegal or wrongful disposition of corporate property, whereby the plaintiffs will be injuriously affected, it reasonably follows the power exists to enjoin the passage of an ordinance authorizing the act whenever irreparable injury will be done to the

plaintiffs and they have no adequate remedy at law; for, from its nature, a preventive remedy may be applied at the inception of a wrongful act, in fact, when it is about to be done, or is threatened.”

² *Roberts v. City of Louisville* (Ky., 1891), 17 S. W. Rep. 216. The court summed up as follows:—“We think a court of equity has not only the power to restrain the passage of an ordinance authorizing an illegal or wrongful disposition of property acquired and held, as is the case of the wharf property, but if needful to compel the general council to perform the duty of preserving, protecting and maintaining it for the purpose intended, though, of course, leaving it to the discretion of that body as to the manner of discharging its trust.”

³ *Coonley v. City of Albany* (1890), 10 N. Y. Supl. 512.

be true though the city council may have passed an ordinance authorizing its street commissioner, in case of a boat being sunk in the harbor, after notification to the owner and his failure to remove it, to take possession, remove and sell the same, or so much of its load as would pay the expense of the removal.¹ Such an ordinance being in excess of the legislative power of the common council is void in so far as it directs the sale of private property.² So far as the State has authorized the city to aid its commerce by removal of obstructions in a river, the authority is in the nature of a privilege, which under its charter the city ought to exercise for the general corporate welfare, but not to relieve proper owners of docks from proper private expenses.³ Such a river is not a highway of the city.⁴

¹ *Coonley v. City of Albany* (1890), 10 N. Y. Supl. 512.

² *Coonley v. City of Albany* (1890), 10 N. Y. Supl. 512. A river which is a part of the highway for State, interstate and foreign commerce is subject to regulation and improvement by congress. The State may exercise such control as does not interfere

with the power vested in congress, and may require a city to provide such control with respect to the portion of the river within its limits. *Mobile County v. Kimball*, 102 U. S. 691.

³ *Coonley v. City of Albany* (1890), 10 N. Y. Supl. 512.

⁴ *Seaman v. Mayor &c.*, 80 N. Y. 239.

CHAPTER XXX.

POLICE POWERS.

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| <p>§ 1248. Nature of the police power.</p> <p>1249. Exercise of police powers by municipal corporations.</p> <p>1250. Requiring abutting owners to remove snow from sidewalks.</p> <p>1251. The same subject continued.</p> <p>1252. Power to license occupations.</p> <p>1253. The same subject continued.</p> <p>1254. The license ordinance.</p> <p>1255. License fees.</p> <p>1256. Hawkers and peddlers.</p> <p>1257. The same subject continued—
Discrimination against non-residents.</p> <p>1258. Reasonableness of license fees for hawkers and peddlers.</p> <p>1259. Hackmen, draymen, etc.</p> <p>1260. Auctioneers.</p> <p>1261. The same subject continued.</p> | <p>§ 1262. Unreasonable license fees for auctioneers.</p> <p>1263. License of book canvassers—
Interstate commerce.</p> <p>1264. Intoxicating liquors.</p> <p>1265. The same subject continued.</p> <p>1266. Hackmen and hotel runners.</p> <p>1267. Regulation of markets.</p> <p>1268. The same subject continued.</p> <p>1269. Ordinances enforcing observance of Sabbath.</p> <p>1270. Regulating weight of bread.</p> <p>1271. Building permits.</p> <p>1272. Wooden buildings and fire limits.</p> <p>1273. Prohibiting carrying concealed weapons.</p> <p>1274. Policy shops.</p> <p>1275. Disorderly houses.</p> <p>1276. Distribution of hand-bills.</p> <p>1277. Ordaining offenses—Criminal intent.</p> |
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§ 1248. Nature of the police power.—The police power is defined by Blackstone as “the due regulation and domestic order of the kingdom, whereby the individuals of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good behavior and good manners, and to be decent, industrious and inoffensive in their respective stations.”¹ “That power,” said the Court of Appeals of New York, “is very broad and comprehensive, and is exercised to promote the health, comfort, safety

¹ 4 Blackstone's Commentaries, 162. health and prosperity, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made.” *Thorpe v. Rutland &c. R. Co.*, 27 Vt. 140.

and general welfare of society. . . . Under it the conduct of an individual and the use of property may be regulated, so as to interfere to some extent with the freedom of the one and the enjoyment of the other.”¹ Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare. All authorities agree that the constitution presupposes the existence of the police power, and is to be construed with reference to that fact.²

§ 1249. Exercise of police powers by municipal corporations.—Municipal corporations have exercised the police power *eo nomine* for time out of mind by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities; and this power of local legislation may be conferred upon the smallest village that the legislature sees fit to incorporate as well as upon the largest city in the State.³ The extent of their police powers depends upon the limitations of their charters.⁴ The power to be exercised is frequently restricted to the one phrase “police powers,” and the ordinances must then be reasonable regulations upon subjects which are recognized as falling within the scope of such powers. “A grant of police power, however, can never be taken to authorize ordinances upon some subject which is partially or imperfectly given to the control of the corporation by an express grant, for the existence of the express grant shows that the legislative

¹*In re Jacobs*, 98 N. Y. 98, 108, quoted and approved in *Village of Carthage v. Frederick*, 122 N. Y. 268, 277. “All property is held subject to the general police power of the State to so regulate and control its use in a proper case as to secure the general safety and the public welfare.” *People v. Gillson*, 109 N. Y. 389, 398; 1 Dillon on Munic. Corp., § 212. “Police power authorizes all regulations tending to promote the public health, morals, security and comfort

of the community.” *Hörr & Bemis on Munic. Police Ordinances*, § 212.

²*Village of Carthage v. Frederick*, 122 N. Y. 268, 273; 2 Hare’s Am. Const. Law, 766; Anderson’s Law Dict., tit. “Police;” Sedgwick on Statutory and Constitutional Law, 435; Tiedeman’s Limitations of Police Power, 12; Potter’s Dwarrris on Statutes, 458.

³*Village of Carthage v. Frederick*, 122 N. Y. 268, 273, 277.

⁴Tiedeman’s Limitations of Police Power, 12.

mind was specially directed to that subject, and the grant must be taken as the limit of its intention. And where nearly all the ordinary police powers are made the subjects of express grants, only such additional ones can be exercised under a general grant of police power as are absolutely essential to the welfare of the community."¹

§ 1250. Requiring abutting owners to remove snow from sidewalks.— Under a general authority to make all needful and salutary by-laws it was held by the supreme judicial tribunal of Massachusetts, Chief Justice Shaw delivering the opinion of the court, that an ordinance of the city of Boston requiring owners or occupants of houses bordering on streets to remove the snow from their respective sidewalks within a specified time was a reasonable and valid exercise of the police power; and not obnoxious to the objection that it imposed a tax and thus violated the fundamental maxim that all burdens and taxes laid on the people for the public good shall be equal; nor was it invalid on account of a part of the city peculiarly situated being expressly exempted from its operation.²

¹ Horr & Bemis on Munic. Police Ordinances, § 211.

² *In re* Petition of Goddard, 16 Pick. 504. Chief Justice Shaw said: — "It is not speaking strictly to characterize this city ordinance as a law levying a tax; the direct principal object of which is raising a revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated that they can most promptly and conveniently perform it; and it is laid not upon a few but upon a numerous class — all those who are so situated, and equally upon

all who are within the description composing the class. . . . Although the sidewalk is part of the public street and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it and benefit from it distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit often, in accommodating his cellar-door and steps, a passage for fuel, and the passage to and from his own house to the street. . . . For his own accommodation he would have an interest in clearing the snow from his own door. The owners and occupiers of house-lots and other real estate therefore have an interest in the performance of this duty peculiar and somewhat distinct from that of the rest of the community. Besides, from their situation, they

§ 1251. The same subject continued.—The constitutional questions involved were again thoroughly considered and objections pronounced untenable in a recent decision of the New York Court of Appeals. It was there held that a special grant of power to enact ordinances to prevent incumbrances upon the sidewalks and to provide for keeping them free from snow, in connection with the general grant of power to pass all such ordinances as were necessary for carrying into effect the purposes of the corporation and the powers conferred, was sufficient to sustain an ordinance requiring abutting owners to clear their sidewalks of snow and ice within a certain time.¹

§ 1252. Power to license occupations.—A municipal corporation has no power to require a license in order to carry on a certain pursuit unless it be expressly granted or arise by

have the power and ability to perform this duty with the promptness which the benefit of the community requires, and the duty is divided, distributed and apportioned upon so large a number that it can be done promptly and effectually and without imposing a very severe burden upon any one."

¹ Village of Carthage v. Frederick, 122 N. Y. 268. "In reaching this conclusion," said the court, "we have not overlooked the case of Gridley v. City of Bloomington, 88 Ill. 554, but have given it the attention to which it is entitled by the high standing of the court that decided it. The argument upon which the opinion in that case rests is that the fee of the street was in the corporation and the sidewalk was a part of the street; the lot-owner had no more interest in the sidewalk in front of his premises than any other citizen of the municipality, because it was set apart for the exclusive use of persons traveling on foot, and was as much under the control of the municipal government as the street itself. We are unable to yield to this reasoning, because it

overlooks not only the public safety and general convenience but also the peculiar interest that every owner or occupant has in a clean sidewalk in front of his own premises. Whatever adds to the usefulness of a sidewalk adds both to the rental and permanent value of the adjacent lot." Village of Carthage v. Frederick, *supra*, is supported expressly or in principle by Reinken v. Fuhring (Ind., 1892), 30 N. E. Rep. 414; People v. Mattimore, 45 Hun. 448; Moore v. Williams, 15 N. Y. 502; Phelps v. Racey, 60 N. Y. 10; Cronin v. People, 82 N. Y. 318; Moore v. Gadsden, 93 N. Y. 12, 17; Dixon v. Brooklyn City & C. R. Co., 100 N. Y. 176, 179; People v. Arensberg, 105 N. Y. 123; Vanderbilt v. Adams, 7 Cowen, 349; Coates v. Mayor & C., 7 Cowen, 585, 606; Stokes v. New York, 14 Wend. 88; Sharpless v. Mayor & C., 21 Penn. St. 147; Beer Co. v. Massachusetts, 97 U. S. 25, 33; Palmer v. Way, 6 Colo. 106; State v. Mayor, 37 N. J. Law, 428; Kirby v. Boyleston, 14 Gray, 252; Pedrick v. Bailey, 12 Gray, 163; Hartford v. Talcott, 48 Conn. 525.

clear implication from language used.¹ Under a statute empowering cities to levy license taxes on attorneys residing therein, a city may not levy such a tax on attorneys not residing therein but having offices and doing business therein.² A city charter authorized the imposition of a license tax on persons engaged in certain enumerated callings, and "upon any other person or employment which it may deem proper, whether such person or employment be herein specially enumerated or not." It was held not to authorize the imposition of a tax on a railroad corporation.³ And a statute which conferred authority to license certain specified occupations and pursuits and "all other business, trades, avocations or professions" did not include an authority to license the business of an abstractor of titles to real property.⁴

§ 1253. The same subject continued.—An ordinance of the city of St. Louis imposing a license on persons selling sewing-machines as agents was held to be valid, under the provisions of the charter authorizing the city authorities to "license, tax and regulate agents, real-estate agents and brokers, financial agents and brokers, mercantile agents, insurance agents and all other business, trades, avocations or professions

¹ *Ex parte Garza* (1890), 28 Tex. App. 381; s. c., 19 Am. St. Rep. 845; *Goetler v. State*, 45 Ark. 454 (ten-pin alley); *Ordinary v. Retailers*, 42 Ga. 325; *Fowle v. Alexandria*, 3 Peters, 399; *Sanders v. Butler*, 30 Ga. 679; *Railway Co. v. Hoboken*, 41 N. J. Law, 71. Power to enact "by-laws relative to auditors," etc., does not authorize the imposition of a license. *Dunham v. Rochester*, 5 Cowen, 462; *Commonwealth v. Stodder*, 2 Cush. 562; *St. Paul v. Stoltz*, 33 Minn. 233; *Charleston v. Oliver*, 16 S. C. 47; *Gale v. Kalamazoo*, 23 Mich. 344; *Jackson v. Bowman*, 39 Miss. 671; *House v. State*, 41 Miss. 737.

² *Garden City v. Abbott*, 34 Kan. 283.

³ *Lynchburg v. Norfolk &c. R. Co.*, 80 Va. 237.

⁴ *City of St. Joseph v. Porter*, 29

Mo. App. 605. Minn. Sp. Laws 1881, ch. 93, § 16, authorizes cities to enact such "ordinances not inconsistent with the laws of the State which shall be deemed expedient for the good government of the city, . . . the benefit of trade," etc. This was held not to authorize an ordinance requiring peddlers to procure a license. *St. Paul v. Stoltz*, 33 Minn. 233; *Gunn v. City of Macon*, 84 Ga. 365; *Leonard v. Canton*, 35 Miss. 189. Power to "regulate" wash-houses includes the power to license them. *Re Wan Yin*, 22 Fed. Rep. 701. Power to "regulate" hotels includes the power to license. *Russellville v. White*, 41 Ark. 485. See, also, *Fort Smith v. Ayers*, 43 Ark. 82; *Chicago Packing Co. v. Chicago*, 88 Ill. 221; *State v. Hoboken*, 33 N. J. Law, 280.

whatsoever; to license, tax, regulate or suppress all occupations, professions and trades not heretofore enumerated, of whatever name and character.”¹ And where a city charter gave power to the common council to license numerous classes of persons and occupations, “and all other business, trades, avocations or professions whatever,” it was held that licenses might be required from ice dealers, as included in the term “merchants” in the classes specifically enumerated, even if not within the general words, as *ejusdem generis* with those particularly mentioned.² Under the power “to license, regulate and restrain bar-rooms and drinking-shops,” the business of keeping a bar-room may be licensed, and the sale of spirituous liquors without a license may be forbidden.³

§ 1254. The license ordinance.—It is not essential that the license should be in writing,⁴ but it is material to its validity that a fixed and definite license fee should be named therein, which all persons engaged in like business shall pay, and that it should state the time of the duration and validity of the license to be issued.⁵ The power to issue a license cannot be delegated by the council,⁶ but the council may prescribe the mode of applying for a license, as, for instance, by a petition accompanied by a certificate of a certain number of citizens as to the character of the applicant.⁷ However, it is said that “the rule may be considered universal that no judicial discretion may be conferred upon the officer issuing the license.”⁸

¹ *City of St. Louis v. Bowler* (Mo.), 7 S. W. Rep. 434.

² *City of Kansas v. Vindquest*, 36 Mo. App. 584. See, also, *Butler's Appeal*, 73 Pa. St. 448.

³ *Ex parte Schneider*, 11 Oregon, 288.

⁴ *Boston v. Schaffer*, 9 Pick. 415. And when it is in writing a *fac-simile* signature is sufficient. *Swarth v. People*, 109 Ill. 621.

⁵ *Bills v. City of Goshen*, 117 Ind. 221; *Horr & Bemis on Munic. Police Ordinances*, § 13.

⁶ *In re Bickerstaff*, 70 Cal. 35, 39; *Darling v. St. Paul*, 19 Minn. 389.

Otherwise if there be express authority for such delegation. *Brooklyn v. Breslin*, 57 N. Y. 591.

⁷ *In re Bickerstaff*, 70 Cal. 35. See, also, *Powers v. Decatur*, 54 Ala. 214; *Commonwealth v. Stockley*, 12 Phila. 316. *Cf. In re Quong Woo*, 13 Fed. Rep. 229.

⁸ *Horr & Bemis on Munic. Police Ordinances*, § 263; *Elwood v. Bullock*, 6 Q. B. 383. In *State Center v. Barenstein*, 66 Iowa, 249, an ordinance requiring that peddlers “shall pay not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor,” was

§ 1255. **License fees.**—Although the power to license and regulate occupations is conferred solely for police purposes, and municipal corporations have no power to use it as a means of increasing their revenues, they may require a reasonable fee to be paid for a license. The amount they have a right to demand depends chiefly upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expense of issuing the license and to pay the expenses which may be incurred in the enforcement of such police inspections or superintendence as may be lawfully exercised over the business may be required.¹ If the fee required is not plainly unreasonable the courts ought not to interfere with the discretion of the municipal authorities in fixing it; and unless the contrary appears on the face of the ordinance requiring it, they should presume it to be reasonable.²

§ 1256. **Hawkers and peddlers.**—A peddler is one who sells from place to place or offers for sale commodities which he carries with him.³ But a person who goes about delivering goods in the houses of his customers in pursuance of orders

held invalid because the mayor might fix so short a time as to be equivalent to a refusal to license at all. But an ordinance authorizing the mayor to fix a fee within a specified sum was sustained in *Decorah v. Dustan*, 38 Iowa, 96. See, also, *Bradley v. City of Rochester*, 7 N. Y. Supl. 737. A city ordinance prohibiting the sale of liquor without a license, and restricting the business to certain districts of the city "to be designated by the mayor," was held constitutional, except as to the attempted restriction, which section might properly be stricken out by amendment. *State v. Kantler*, 33 Minn. 69.

¹ *City of Fayetteville v. Carter*, 52 Ark. 301; s. c., 6 L. R. An. 509, and note.

² *City of Fayetteville v. Carter*, 52

Ark. 301; *Burlington v. Putnam Ins. Co.*, 31 Iowa, 105, 106; *Denver City Ry. Co. v. City of Denver* (Colo., 1892), 30 Pac. Rep. 1048; *Van Hook v. Selma*, 70 Ala. 361; *Van Baalen v. People*, 40 Mich. 258; *Laundry License Cases*, 22 Fed. Rep. 701; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Ex parte Chin Yan*, 60 Cal. 78; *Ex parte Gregory*, 20 Tex. App. 210; *State Center v. Barenstein*, 66 Iowa, 249; *Fisher v. Harrisburg*, 2 Grant (Pa.), 291; *St. Louis v. Weber*, 44 Mo. 547; *Corrigan v. Gage*, 68 Mo. 541; *State v. Ironton Gas Co.*, 37 Ohio St. 45; *Clason v. Milwaukee*, 30 Wis. 316; *Poyer v. Village of Desplaines*, 22 Ill. App. 576.

³ *Horr & Bemis on Munic. Police Ordinances*, citing *Cook v. Pennsylvania*, 97 U. S. 556.

previously taken therefor, and takes orders for future delivery, is not a peddler.¹

§ 1257. The same subject continued — Discrimination against non-residents.— An ordinance practically prohibiting peddling and selling goods from house to house by sample or otherwise, by requiring a high license to be first obtained which excepts from its operation residents of the city, is not a valid exercise of the police power but a discriminating trade regulation and is void.² And an ordinance imposing a greater fee on a non-resident applicant for a license than on a resident within the city is unreasonable and void as in restraint of trade.³

¹ Village of Stamford v. Fischer, 17 N. Y. Supl. 609; Village of Cerro Gordo v. Rawlings (Ill.), 25 N. E. Rep. 1006, following Emmons v. City of Lewiston, 135 Ill. 36; s. c., 24 N. E. Rep. 1006. See, also, *Ex parte* Taylor, 58 Miss. 478. A drummer who sells his principal's goods by sample, merely taking orders for them, does not require a license such as must be taken out by "hawkers, peddlers and merchants." Kansas v. Collins, 34 Kan. 434; Chicago v. Barteel, 100 Ill. 61, the latter case holding, however, that a milkman is a peddler. As to who is a merchant, see Burr v. Atlanta, 64 Ga. 225. A charter gave to the common council the power to regulate the vending of vegetables, etc., and to regulate and restrain hawking and peddling in the streets. An ordinance prohibiting the peddling of vegetables without a license was not void as discriminating in favor of some and against other forms of traffic. Bradley v. City of Rochester, 7 N. Y. Supl. 237. See, also, Village of Ballston Spa v. Markham, 11 N. Y. Supl. 826; Martin v. Town of Rosedale (Ind.), 29 N. E. Rep. 410. An ordinance prohibiting vehicles from stopping in the streets for more than twenty minutes is a

valid police regulation and applies as much to licensed peddlers as to others. Commonwealth v. Fenton, 189 Mass. 195.

² Borough of Sayre v. Phillips (Pa., 1892), 24 Atl. Rep. 76. It was held in Illinois that a village ordinance which imposed a license fee upon non-resident peddlers only was unreasonable, contrary to the laws and constitution of the State, being an unwarrantable discrimination between residents and non-residents, contrary to public policy as tending to create monopolies, and so void. Village of Braceville v. Doherty, 30 Ill. App. 645. See, also, Brooks v. Mangan (Mich.), 49 N. W. Rep. 633.

³ State v. City of Orange (N. J.), 13 Atl. Rep. 240. See, also, Commonwealth v. Stoddard, 2 Cush. 562; Graffty v. Rushville, 107 Ind. 502; Daniel v. Richmond, 78 Ky. 542. A city order requiring all peddlers and drummers to pay a license tax is not void as discriminating against the products of other States, although as a matter of fact few of the residents of the city or State care to sell under it so that in practice most of the revenue under it is derived from outsiders. *Ex parte* Hanson, 28 Fed. Rep. 127.

§ 1258. Reasonableness of license fees for hawkers and peddlers.—The following are some of the instances in which the amount of the license fees exacted from hawkers and peddlers was declared not to be unreasonable and oppressive:—A license fee of \$2.50 per day.¹ A license fee of \$100 for one year, \$60 for six months, \$15 for one month, and \$5 for one day for peddling within the city of Duluth.² An ordinance which fixed the license of a peddler of meats “from a vehicle” at \$75 per quarter, and the license of all other peddlers at \$10, irrespective of the commodity peddled.³ But under the charter of Bay City, Michigan, authorizing the city to license hawkers and peddlers, an ordinance requiring the payment of \$10 for the first day, and \$5 for each subsequent day, by foot-peddlers; \$20 for the first day, and \$15 for each subsequent day, where the peddler traveled with one horse; and \$25 for the first day, and \$15 for each subsequent day, where he traveled with two or more horses,—was adjudged to be so unreasonable and prohibitory as to render it invalid.⁴ And a city ordinance requiring peddlers to pay as a license “not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor,” was also held void for unreasonableness.⁵

§ 1259. Hackmen, draymen, etc.—The provision in the charter of the city of Minneapolis authorizing the city council “to license and regulate hackmen, draymen, expressmen and all other persons engaged in carrying passengers, baggage or freight and to regulate their charges thereon,” was held to apply only to those who were engaged in business as carriers of persons or property for hire, and not to those who, not being engaged in such business, merely hired out teams and vehicles to those who had property to transport, the hirer himself using and controlling the team and vehicle.⁶ A power granted to a city in its charter to “license, tax and regulate . . . street railroad cars and companies, hackney carriages, omnibuses

¹ Cherokee v. Fox, 34 Kan. 16.

⁴ Brooks v. Mangan (Mich.), 49 N.

² City of Duluth v. Krupp (Minn.), W. Rep. 633.

49 N. W. Rep. 235.

⁵ State Center v. Barenstein, 66

³ Ex parte Hayleman, 92 Cal. 492; Iowa, 249.

s. c., 28 Pac. Rep. 675.

⁶ State v. Robinson, 42 Minn. 107; s. c., 43 N. W. Rep. 833.

and all other vehicles, . . . and fix the rates for carriage of persons and of wagonage, drayage and cartage of property," confers no authority to impose a license tax on a vehicle used exclusively for the private purposes of its owner.¹ But where a city charter confers the power to regulate the keeping and use of vehicles and to impose license taxes on them, an ordinance requiring every owner of a hack to take out a license at \$8 per annum, and pay the cost of numbering the hack, not exceeding twenty-five cents, is valid.²

¹ *City of Hannibal v. Price*, 29 Mo. App. 280; *St. Louis v. Grove*, 46 Mo. 574. Act of Pennsylvania of April 8, 1851, section 2, authorizing boroughs to make such ordinances, not inconsistent with the laws of the commonwealth, as they shall deem necessary for their good order and government, which is followed by twenty-five other sections, specifying minutely the subjects that may be so regulated by ordinance, none of which refer to the licensing of vehicles, does not authorize an ordinance requiring such license. *Borough of Millerstown v. Bell*, 123 Pa. St. 151; s. c., 23 W. N. C. 78. Act of New Jersey of March 25, 1881, conferring on municipal corporations the power to license and regulate hack owners and drivers, and to prohibit unlicensed persons and vehicles from engaging in such capacities, warrants the imposition of a reasonable pecuniary penalty for a violation of an ordinance requiring such a license. *Haynes v. City of Cape May*, 52 N. J. Law, 180. Public Statutes of Massachusetts, chapter 28, section 25, empowers the mayor and aldermen of a city to regulate all vehicles used therein. Statutes of 1878, chapter 244, established a board of police commissioners in Boston, and provided that the council could empower the board to exercise all the powers conferred by the statutes

on the board of aldermen, etc., in relation to regulating vehicles. Statutes of 1885, chapter 323, established a board of police in Boston, conferring on it the powers vested in the commissioners by the statutes of the State and the ordinances, by-laws, etc., of the city. Revised Ordinances of Boston, 1885, chapter 28, section 1, provides that the board of police shall exercise all powers conferred by the statutes of the State and the city ordinances on the board of aldermen or mayor and aldermen in relation to regulating vehicles. It was held that a rule of the board of police of Boston, providing that no person shall use "any hackney carriage unless he is licensed thereto by the board," and that every vehicle "used for the conveyance of persons for hire from place to place within the city, except a horse-car, shall be deemed a hackney carriage," is a reasonable exercise of the authority conferred on the board. *Commonwealth v. Page* (Mass.), 29 N. E. Rep. 512.

² *Ex parte Gregory*, 20 Tex. App. 210; s. c., 54 Am. Rep. 516. But under a power to license draymen, a tax cannot be imposed on the occupation itself. *Cincinnati v. Bryson*, 15 Ohio, 625; 1 Dillon on Munic. Corp. (4th ed.), § 358. Act of Kentucky of May 8, 1886, entitled "An act concerning license taxes in the city of Louisville,"

§ 1260. Auctioneers.— Under a statute requiring auctioneers doing business in a city to give bond and obtain a license, and giving power to the mayor of the city to grant such licenses, and also to revoke them for misconduct of the licensees, it was held that the mayor might on proper grounds refuse a license to an applicant although a sufficient bond was tendered. “Where, prior to the doing of a thing, an application for leave to do the same is a condition precedent, the power to refuse such leave in a proper case is necessarily implied,” said the court. A contrary theory applied to the particular case would be that immediately following the revocation of a license, upon the presentation of a proper bond the mayor would be required to re-issue it.¹

§ 1261. The same subject continued.— Under an authority given by statute “to regulate auctioneering and to regulate, license or prohibit the sale of goods, wares and merchandise imported into the corporation for the purpose of being sold at auction,” it was held in a recent case in Ohio that a city ordinance which made it unlawful to sell at auction goods brought

and among other things providing a license tax “for each vehicle running in said city of not less than \$2 nor more than \$30,” confers on the council the right by ordinance to classify and grade the privilege according to the use made of the vehicle. *Smith v. City of Louisville (Ky.)*, 6 S. W. Rep. 911. A statute authorizing the imposition of a license tax on vehicles used for certain business purposes, by the municipality “in which the business is carried on or conducted,” does not authorize a municipality to impose a tax on a vehicle temporarily and accidentally in the city on business of the nature described, since the *situs* of the business and not temporary presence determines the application of the tax. *Cary v. City of North Plainfield (N. J.)*, 7 Atl. Rep. 42.

¹ *People v. Grant* (1890), 12 N. Y. Supl. 889 (aff’d, 126 N. Y. 473; s. c., 27

N. E. Rep. 964); citing *Insurance Co. v. Poillon*, 7 N. Y. Supl. 834. “Whether or not proper cause existed for the refusal of the mayor in the case at bar,” said the court, “cannot be reviewed on *mandamus*, because *mandamus* will not issue unless the relator shows a clear legal right to the writ; and questions as to the weight of evidence, or as to whether the refusal of the mayor has been arbitrary or not, must be brought to the attention of the court in a different manner, in order that it may obtain jurisdiction to review the same.” A city, under the power to regulate the “ringing of bells and the crying of goods for sale at auction or otherwise, and to prevent disturbing noises in the streets,” cannot prohibit the auction sale of jeweler’s goods after sunset. *Rochester v. Close*, 35 Hun, 208.

into the city for that purpose, except upon payment of a license fee of \$25 for each day and part of a day, was an unreasonable exercise of the powers granted and invalid.¹

§ 1262. Unreasonable license fees for auctioneers.—A city of six or seven thousand inhabitants, authorized by its charter to license and regulate auctions and auctioneers, has not the right to impose a license fee of \$300. As a police regulation such a fee is unreasonable; if intended for revenue it is unauthorized.² In respect to exhibitions, amusements, etc., a larger discretion on the part of municipal corporations is recognized than in the case of trades and useful occupations, and the rule has of course a still broader application where the business is such as is liable to degenerate into a nuisance or such as tends to promote disorder or crime. But the business of an auctioneer is a lawful and useful one, and there would seem to be no reasonable warrant from its nature or the expenses that might be directly or indirectly incurred in regulating it for exacting so large a sum as a license fee, the result of which it appears is not to regulate but to suppress such business.³

¹ *Sipe v. Murphy* (Ohio, 1892), 31 N. E. Rep. 884. "The powers thus vested in cities," said the court, ". . . though general are not without limitation: It is not to be presumed from the language of the statute that it was the design of the legislature to authorize the passage of ordinances that would be unjust or oppressive, or unfair and partial, or in restraint of trade, or in contravention of public policy." It was held that the ordinance in question was obnoxious to each of the objections suggested. It was conceded that the council, in view of promoting the order, comfort and convenience of the inhabitants, might pass ordinances regulating sales at auction upon the streets and subject the occupation to such police regulations as public convenience and protection required, and the council might upon principles

of equality, without discriminating against the goods imported, license the sale at auction of such imported goods, and when public safety or morals were endangered prohibit the sale. "But we do not find the reasonable intendment of the statute," continued the court, "to be to empower councils to arbitrarily prohibit, either by words of prohibition or by heavy license fee, the sale at public auction, . . . notwithstanding such goods may be of a harmless nature and even useful and beneficial to the community."

² *Mankato v. Fowler*, 32 Minn. 364.

³ *City of Mankato v. Fowler*, 32 Minn. 364. In Illinois a more liberal rule of construction in reference to license fees obtains. *Terry Co. v. East St. Louis*, 102 Ill. 560; *Howland v. City of Chicago*, 108 Ill. 500; *Braun v. City of Chicago*, 110 Ill. 186; *Dis-*

§ 1263. License of book canvassers.—Interstate commerce.—An ordinance of the city of Titusville, Pa., requiring the payment of a license fee from all persons soliciting orders for goods, books, etc., was held to be void as a regulation of interstate commerce so far as it applied to an agent soliciting orders for books to be filled on the approval of his principal in New York, notwithstanding the books were sent from a storehouse in Pittsburgh, Pa., which was kept replenished from the main office in New York. The agent arrested for the violation of the ordinance was released by the federal court on *habeas corpus*.¹

§ 1264. Intoxicating liquors.—Where the sale of intoxicating liquor is prohibited by the constitution, it is of course incompetent for the legislature to authorize a municipal corporation to permit the sale of it under any conditions. But in the absence of such a restraint the power to regulate or license the traffic may be conferred upon the municipality;² and it is within the legislative discretion to confer an exclusive power in that behalf.³ But general laws relating to the

tilling Co. v. City of Chicago, 112 Ill. 19; Dennehy v. City of Chicago, 120 Ill. 627. It is there held that a power to license in a city charter includes a power to tax, and to fix such license at so high a rate as to become a source of revenue to the city. Kinsley v. City of Chicago, 124 Ill. 359.

¹ *In re Nichols* (1891), 48 Fed. Rep. 169. The same principle applied in the case of the delivering the books sold by the agent. *In re Tyerman*, 48 Fed. Rep. 167. See, also, *Robbins v. Taxing Districts*, 120 U. S. 489; *Leloup v. Port of Mobile*, 127 U. S. 640; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *Pullman's Palace-Car Co. v. Penn.*, 141 U. S. 18; *In re White*, 43 Fed. Rep. 913, identical in point; *Ex parte Stockton*, 33 Fed. Rep. 95; *In re Kimmel*, 41 Fed. Rep. 775; *Case of Spain*, 47 Fed. Rep. 208; *Spellman v. New Orleans*, 45 Fed. Rep. 3.

² *Moundville v. Fountain*, 27 West

Va. 182; *Jelly v. Dills*, 27 West Va. 267; *Mason v. Trustees*, 4 Bush, 406; *State v. Harper*, 42 La. Ann. 312. The constitution of California, article 11, section 11, providing that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws," was held to authorize imposing a liquor license tax. *Ex parte Wolters*, 65 Cal. 269; *Ex parte Smith*, 38 Cal. 708; *People v. Martin*, 60 Cal. 156; *Ex parte Campbell*, 74 Cal. 20; s. c., 15 Pac. Rep. 318. See, also, *Trageser v. Gray*, 73 Md. 250; s. c., 20 Atl. Rep. 905.

³ *Huffsmith v. People*, 8 Colo. 175; *State v. Andrews*, 11 Neb. 523; *Bennet v. People*, 30 Ill. 389; *State v. Wheeler*, 27 Minn. 76; *Coulterville v. Gillen*, 72 Ill. 599; *Phillips v. Tecumseh*, 5 Neb. 312; *Camp v. State*, 27 Ala. 53; *State v. Nolan*, 57 Minn. 16.

subject are not impliedly repealed by statutory or charter provisions enabling a municipal corporation to pass ordinances regulating the business.¹

§ 1265. **The same subject continued.**—Under the statute of Illinois which empowers the president and board of trustees of villages “to license, regulate and prohibit the sale of intoxicating liquors,” they may by ordinance provide for the issuing of licenses in one part of a village and prohibit the sale of intoxicating liquor in another part of the village.² But an ordinance making it unlawful for any person to carry on the business of a liquor dealer without a license, which could only be obtained upon the “written consent of a majority of the board of police commissioners,” or in default of that upon “the written recommendation of twelve citizens,” was condemned as a violation of the fourteenth amendment of the constitution of the United States.³

¹ *Gardner v. People*, 20 Ill. 430; *Loeb v. Attica*, 82 Ind. 175; *Schroeder v. City Council*, 2 Treadw. Const. 726; *New Hampton v. Conroy*, 56 Iowa, 498; *State v. Witter*, 107 N. C. 792; *House v. State*, 41 Miss. 737. “But on the other hand, if supported by a sufficient grant of power, municipal corporations may make more detailed or more stringent regulations on the subject of the sale of intoxicants than those imposed by the general laws of the State. *Pekin v. Smelzel*, 21 Ill. 464. And an ordinance, though following a line parallel to that of the statute, will be sustained as valid, provided only that there is no necessary inconsistency between the two. *Mayson v. Atlanta*, 77 Ga. 662.” *Black on Intoxicating Liquors* (West Publishing Co., 1892), § 223, on “Conflict of ordinance with general law,” and other cases there cited.

² Where such ordinance makes no discrimination between persons, the discrimination that it makes between places cannot be said to create a

monopoly in the saloon business. *People v. Cregier* (Ill.), 28 N. E. Rep. 812.

³ *In re Christensen*, 43 Fed. Rep. 243. The case was held to fall precisely within the principle laid down, as follows, in *Wo Lee v. Hopkins*, 118 U. S. 356:—“A municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality violates the provision of the constitution of the United States if it confers upon the municipal authorities arbitrary power at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or to the propriety of place selected for the carrying on of the business.” See, also, *Laundry License Case*, 13 Fed. Rep. 229; *In re Wo Lee*, 26 Fed. Rep. 471. But under the law of a State prohibiting the sale of liquors except under a license upon a petition signed by a majority of the voters, the authorities are not

§ 1266. **Hackmen and hotel-runners.**—An ordinance authorizing the depot marshal or any police officer to prescribe the place where omnibuses, hacks and other vehicles shall stand at a railroad depot while waiting for passengers, and requiring drivers to obey the directions of the police officer with reference thereto, is valid.¹ Under the provision of a village charter giving the trustees power “to restrain and prohibit all runners, solicitors or guides for boats, carriages, railroads, public houses, places of resort or for any other place or purpose whatsoever;” and under an ordinance of the village prohibiting such persons from soliciting, etc., “within the corporate limits of this village,”—it is as unlawful to do the prohibited acts on the private property of the defendant as in the public streets.²

bound to grant the license, though all the provisions of the law be complied with by a petitioner, but in their discretion can refuse it in any instance. *Perkins v. Ledbetter*, 68 Miss. 327; s. c., 8 So. Rep. 507. See, also, *Perry v. Salt Lake City* (Utah), 25 Pac. Rep. 739; *In re Bickerstaff*, 70 Cal. 35. And *certiorari* lies to review proceedings of the council in granting a license upon an application by an insufficient number of petitioners. *Dexter v. Cumberland* (R. I.), 21 Atl. Rep. 347. An ordinance prohibiting dram-shops, and imposing a license of \$500 a year on the sale of intoxicating liquor by measure, is not void as an unreasonable exercise of a power to suppress dram-shops and to levy a license tax on liquor sellers. *City of Elk Point v. Vaughn* (Dak.), 46 N. W. Rep. 577. But a license fee of \$500 imposed on a druggist in a small town was declared unreasonable. *City of Lyons v. Cooper*, 39 Kan. 324; s. c., 18 Pac. Rep. 296. In a jury trial for violation of an ordinance imposing a license tax on liquor sellers, evidence of the population of the city and county and the annual sales of liquor and the profits

thereof is properly rejected; the reasonableness of the ordinance being for the court. *City of Elk Point v. Vaughn*, *supra*. Under the power of a city “to tax, license and regulate” brewers, distillers, etc., it may require a license fee of \$500 for each brewery and for each distillery. Such is not a “tax” in the constitutional sense. *United States Distilling Co. v. Chicago*, 112 Ill. 19.

¹ *Veneman v. Jones*, 118 Ind. 41.

² *Village of Niagara Falls v. Salt*, 45 Hun, 41. A city ordinance prohibited the standing in certain places of “hacks, baggage-wagons and public conveyances.” It was held that an omnibus employed by a hotel to convey its guests to and fro free of charge was not a “public conveyance,” within the ordinance. *Oswego v. Collins*, 38 Hun, 171. An ordinance providing that cabs shall stand on certain parts of certain streets, and that any violation thereof shall be a misdemeanor, does not make a person standing a cab elsewhere than as provided guilty of a misdemeanor. *City of Helena v. Gray*, 7 Mont. 486; s. c., 17 Pac. Rep. 564. In an action for the violation of an or-

§ 1267. Regulation of markets.—A market is a public place appointed by public authority where all sorts of things necessary to the subsistence or for the convenience of life are sold; or, in other words, it is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale.¹ In this country the authority to establish and regulate markets falls within the police power of the State, and the right to exercise such authority may be conferred by a State upon municipal corporations; and it is competent for these corporations, where the delegation of power is sufficient, to prohibit the sale of marketable articles outside of the regularly established markets.²

§ 1268. The same subject continued.—There was some conflict of authority among the earlier cases as to whether a grant of the power to “establish and regulate markets” implies, when standing alone, authority to prohibit sales outside of the duly established markets; but the weight and current

dinance prohibiting hackmen and porters from soliciting patronage at the depot or on the platform of any railroad in the city, it is no defense that the superintendent of a railroad had given defendant permission to stand beyond a certain line on the platform and solicit patronage. *City of Chillicothe v. Brown*, 38 Mo. App. 609. A rule of the board of police of Boston, providing that no person shall use “any hackney carriage unless he is licensed thereto by the board,” and that every vehicle “used for the conveyance of persons for hire from place to place within the city, except a horse-car, shall be deemed a hackney carriage,” applies to all vehicles used in the city for the conveyance of persons for hire, whether the vehicles stand in public places or in the stables of their owners. *Commonwealth v. Page* (Mass.), 29 N. E. Rep. 512.

¹ *Breese, J.*, in *Caldwell v. Alton*, 33 Ill. 416; *City of Jacksonville v. Ledwith*, 26 Fla. 168. See, also, *Cin-*

cinnati v. Buckingham, 10 Ohio, 257; *McLin v. City of Newbern*, 70 N. C. 12; *City of Burlington v. Dankwardt*, 78 Iowa, 170; *Prince v. Lewis*, 5 Barn. & C. 363; *Mosley v. Walker*, 7 Barn. & C. 55.

² *City of Bowling Green v. Carson*, 10 Bush, 64; *First Municipality v. Cutting*, 4 La. Ann. 335; *Ex parte Byrd*, 84 Ala. 17; s. c., 5 Am. St. Rep. 328. Ordinance prohibiting keeping of private market within six squares of public market not in contravention of the fourteenth amendment of the federal constitution. *Natal v. Louisiana*, 139 U. S. 621; *Morano v. Mayor*, 2 La. 217; *New Orleans v. Stafford*, 27 La. Ann. 417; *Bush v. Seabury*, 8 Johns. 419; *Buffalo v. Webster*, 10 Wend. 99; *Nightingale's Case*, 11 Pick. 168; *Commonwealth v. Rice*, 9 Met. 253. Power to make by-laws for managing and ordering its prudential affairs, held sufficient to authorize appropriation of money for a market-house. *Spaulding v. Lowell*, 23 Pick. 71.

of the later cases show conclusively that the delegation of the first-mentioned power includes the other.¹

§ 1269. Ordinances enforcing observance of Sabbath.—

Under the general welfare clause, or other general grant of power to enact police regulations, it is competent to prohibit the keeping open of places of business on Sunday.² But a

¹ *City of Jacksonville v. Ledwith*, 26 Fla. 163; s. c., 23 Am. St. Rep. 558, and note on page 581, citing *Ex parte Byrd*, 84 Ala. 17; s. c., 5 Am. St. Rep. 328; *Cronin v. People*, 82 N. Y. 318; s. c., 37 Am. Rep. 564; *Ex parte Canto*, 21 Tex. App. 61; s. c., 57 Am. Rep. 609; *People v. Keir*, 78 Mich. 98; *Gossigi v. New Orleans*, 41 La. Ann. 522; *State v. Gisch*, 31 La. Ann. 544; *State v. Pendergrass*, 106 N. C. 664; *St. Louis v. Weber*, 44 Mo. 547; *Newson v. Galveston*, 76 Tex. 559; *Morris v. Mayor*, 2 La. 217; *Winnsboro v. Smart*, 11 Rich. 551; *Ash v. People*, 11 Mich. 347; s. c., 83 Am. Dec. 740. *Contra*, *Bethune v. Hughes*, 28 Ga. 560 (see *Badkins v. Robinson*, 53 Ga. 613); *St. Paul v. Laidler*, 2 Minn. 190; s. c., 72 Am. Dec. 89; *St. Paul v. Traeger*, 25 Minn. 248; *Caldwell v. Alton*, 33 Ill. 417; s. c., 85 Am. Dec. 282; *Bloomington v. Wahl*, 46 Ill. 489; *Burlington v. Dankwardt*, 73 Iowa, 170. Location of market may be changed from time to time if deemed expedient. *Wartman v. Philadelphia*, 33 Pa. St. 202; *Gall v. Cincinnati*, 18 Ohio St. 563; *New Orleans v. Stafford*, 27 La. Ann. 417. But not capriciously so as to injure public rights. *Attorney-General v. Detroit*, 71 Mich. 102. Cannot be located so as to obstruct a street or person's place of business. *Wartman v. Philadelphia*, *supra*; *Columbus v. Jacques*, 30 Ga. 506. Power to establish and regulate includes power to license by reasonable license fees. *City of Jacksonville v.*

Ledwith, *supra*; *Davenport v. Kelley*, 7 Iowa, 102; *Gale v. Kalamazoo*, 23 Mich. 344; *Slaughter-house Cases*, 16 Wall. 36; *Butchers' Union &c. Co. v. Crescent City &c. Co.*, 111 U. S. 746; *Villivaso v. Barthet*, 39 La. Ann. 247. But not to tax. *State v. Bean*, 91 N. C. 554. Reasonableness of regulations. *Bloomington v. Wahl*, 46 Ill. 489; *Snell v. Belleville*, 30 U. C. Q. B. 81; *Le Claire v. Davenport*, 13 Iowa, 210; *Kelly v. Toronto*, 23 U. C. Q. B. 425; *Strike v. Collins*, 54 L. T. (N. S.) 152; *Hughes v. Recorder's Court*, 75 Mich. 574; *Commonwealth v. Wilkins*, 121 Mass. 356. In *Ash v. People*, 11 Mich. 347, 352, an ordinance prohibiting persons from keeping a meat-market or stand outside of the market except on payment of an annual license fee of \$5 was sustained as a reasonable market regulation. But a license fee of \$10 for the privilege of selling fresh meat on the streets of a town having no established market was held unreasonable and in restraint of trade in *Chaddock v. Day*, 75 Mich. 527. See, also, *State v. Garibaldi* (La.), 11 So. Rep. 36.

² *McPherson v. Chebanse*, 114 Ill. 46; *Megowan v. Commonwealth*, 2 Met. (Ky.) 3; *Specht v. Commonwealth*, 8 Pa. St. 312; *St. Louis v. Cafferata*, 24 Mo. 94; *Hudson v. Geary*, 4 R. I. 485; *State v. Ames*, 20 Mo. 214; *Cincinnati v. Rice*, 15 Ohio, 225; *Karwisch v. Atlanta*, 44 Ga. 204; *State v. Welsh*, 36 Conn. 215; *Gabel v. Houston*, 29 Tex. 336; *City Council v. Benjamin*, 2 Strob. (S. C.) Law,

power "to secure the health, peace and improvement of the city" was not sufficient to sustain an ordinance requiring the closing of stores on Sunday.¹

§ 1270. Regulating weight of bread.—The police power of a State is not limited to regulations looking to the preservation of life, health, good order and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection.² The charter of the city of Detroit empowered the common council "to direct and regulate the weight and quantity of bread, the size of the loaf and the inspection thereof," and an ordinance prescribing the weight and prohibiting the sale of bread deficient in weight, inasmuch as it did not authorize the seizure of short-weight loaves, was not a taking of private property without compensation.³

§ 1271. Building permits.—Under a general power to pass such ordinances as may be deemed necessary and beneficial to the inhabitants, the authorities may pass an ordinance which they may judge necessary and beneficial, and it will be valid provided it be reasonable and consonant with the general

508. In *Shreveport v. Levy*, 26 La. Ann. 671, an ordinance closing stores on Sunday which excepted from its operation Jews who closed on Saturday was held to be unconstitutional as it discriminated against Gentiles. See, also, *Canton v. Nist*, 9 Ohio St. 439.

¹ *Corvallis v. Carlile*, 10 Oregon, 139. See, also, *Horr & Bemis on Munic. Police Ordinances*, § 288; *Tiedeman's Limitations of Police Power*, pp. 175-188. Texas Penal Code, article 186, makes it an offense for any trader to sell on Sunday. A city ordinance empowered the council to prescribe hours for closing places of business. It was held that the council could not license traders to sell before nine and after four on Sunday. *Flood v. State*, 19 Tex. App. 584, overruling *Craddock v. State*, 18 Tex. App. 567.

² *Tiedeman, Limitations of Police Power*, § 89.

³ *People v. Wagner* (Mich., 1891), 49 N. W. Rep. 609. It was also held that the ordinance did not prohibit the sale of bread exceeding the standard weight, nor the exaction of an increased price by reason of the overweight. As to the constitutional objection see *Wheeler v. Russell*, 17 Mass. 257; *Eaton v. Keegan*, 114 Mass. 433. An ordinance requiring all bakers in the city having wells on their premises to fill them up level with the ground, to the end that the impure water drawn thence should be no more used in bread sold to the public, is not class legislation, as it operates uniformly on the whole class, without discrimination against any. *State v. Schlemmer*, 42 La. Ann. 1166; 8 So. Rep. 307.

powers and purposes of the corporation, and not inconsistent with the laws and policy of the State.¹ Thus it was held that such a grant of power would sustain an ordinance prohibiting any person from erecting any building within the limits of the town without a permit from the governing board.²

§ 1272. **wooden buildings and fire limits.**—There is some conflict in the authorities as to whether a municipal corporation possesses the inherent power to prohibit the erection of wooden buildings within prescribed limits and to cause their removal.³ In speaking of such ordinances the Supreme Court of Michigan said:—"Of the power of the common council to pass the ordinances in question we have no doubt. They contravene no provision of the constitution as we read it, and they were made in the exercise of a police power necessary to the safety of the city."⁴ The same view was adopted in an elaborate opinion by the Supreme Court of Indiana.⁵ But it

¹ Comm'rs of Easton v. Covey (Md., 1891), 22 Atl. Rep. 266, citing 1 Dillon on Munic. Corp., §§ 316, 319; Harrison v. Mayor &c., 1 Gill, 264; Radecke's Case, 49 Md. 238.

² Comm'rs of Easton v. Covey (Md., 1891), 22 Atl. Rep. 266, holding, also, that a fee of \$1 for such a permit was not unreasonable, and that the board had a discretion to grant or refuse a permit in each case.

³ Judge Dillon says that cities may, "where this is consistent with the general and special legislation applicable to the municipality, establish fire limits and prevent erection therein of wooden buildings." 1 Dillon on Munic. Corp. (3d ed.), § 405.

⁴ Brady v. Northwestern Ins. Co., 11 Mich. 425.

⁵ Baumgartner v. Hasty, 100 Ind. 575. See, also, Clark v. South Bend, 85 Ind. 276; Mourue v. Hoffman, 29 La. Ann. 651; Wadleigh v. Gilman, 12 Me. 434; King v. Davenport, 93 Ill. 305. That it is competent and proper for the legislature to confer power to make such regulations, see

Canepa v. Birmingham, 92 Ala. 358; Welch v. Hotchkiss, 39 Conn. 140; First Nat. Bank v. Sarlls, 129 Ind. 201, the last case holding that where a city ordinance prohibits the erection of wooden buildings within its fire limits, individuals who show a threatened violation of the ordinance, and that if unrestrained it will work irreparable injury to them and their property, are entitled to an injunction, though the building if erected would not be a nuisance *per se*. Comm'rs &c. v. Covey, 74 Md. 262; Alexander v. Greenville, 54 Miss. 659; McCloskey v. Kreling, 76 Cal. 511; *Ex parte Fiske*, 72 Cal. 125; Ford v. Thralkill, 84 Ga. 169; Hine v. New Haven, 40 Conn. 478; Hubbard v. Town of Medford, 20 Oregon, 315; Klinger v. Bickel, 117 Pa. St. 326; Knoxville v. Bird, 12 Lea (Tenn.), 121; Charleston v. Reed, 27 West Va. 681; City of Troy v. Winters, 4 T. & C. (N. Y.) 256; City of Olympia v. Mann, 1 Wash. St. 389; Douglass v. Commonwealth, 2 Rawle, 262. That such powers should be strictly con-

was distinctly held in Texas that the power to establish fire limits could not be inferred from general terms used in a charter;¹ and in Pennsylvania that express authority or special circumstances indicating urgent necessity could alone justify such a regulation.²

§ 1273. Prohibiting carrying concealed weapons.—The constitution of California provides that any county, city, etc., “may make and enforce within its limits all such police, sanitary and other regulations as are not in conflict with general laws.” An ordinance prohibiting the carrying of concealed weapons without a permit, and prescribing a penalty of not less than \$250 nor more than \$500, or imprisonment not less than three months and not exceeding six months, or both fine and imprisonment, was held to be valid.³

§ 1274. Policy shops.—The charter of Detroit, providing that the common council may prohibit “all lotteries for the

strued, *Louisville v. Webster*, 108 Ill. 414; *Regina v. Howard*, 4 Ont. 377; s. c., 4 Am. & Eng. Corp. Cas. 377.

¹ *Pye v. Peterson*, 45 Tex. 312, citing especially *Mayor of Hudson v. Thorne*, 7 Paige, 261.

² *Kneedler v. Norristown*, 100 Pa. St. 368. See, also, *State v. Schuchardt*, 42 La. Ann. 49; *Keokuk v. Scroggs*, 39 Iowa, 447; *Respublica v. Duquet*, 2 Yeates (Pa.), 493; *Des Moines v. Gilchrist*, 67 Iowa, 210. “One would think that the necessity would be urgent in every case.” *Horr & Bemis on Munic. Police Ordinances*, § 222.

³ *Ex parte Cheney* (1891), 90 Cal. 617. The charter fixed the maximum limit of penalty for violation of ordinances at \$1,000, and a fine of \$250 was imposed. This the court declared to be reasonable. “Many police regulations which are demanded by the exigencies of life in a crowded city have reference chiefly to social order, and are directed to the promotion of the comfort and safety of the citizen as well as to the protec-

tion of individual and public property. The mode of using the streets, the manner of conducting business, the times and places at which certain occupations shall be plied, are instances of that class, and the power granted to the city is limited to their regulation. It is with reference to ordinances of this character that it is said by courts they must be reasonable, and not violate those rights of the individual that are superior to the demands of society. There are other police regulations, however, which are intended for the prevention of crime and the preservation of the public peace, and in reference to which the legislative body of the city is vested with a discretion that is not reviewable by the courts. In the exercise of this power the municipality, in determining the penalty to be imposed for violating its ordinances, is limited only by the terms of its charter, and the reasonableness of the punishment is not to be questioned elsewhere.”

drawing or disposing of money or any other property whatsoever," was construed to authorize the prohibition of policy shops;¹ and a city ordinance providing that every person who shall keep or manage any room or place for the purpose of conducting or carrying on, or of allowing other persons to play, conduct or carry on, the game commonly known as "policy," or who shall write, sell or buy any of the slips, tickets or chances used in such game, or who shall in any other way knowingly take any part in such game, shall be fined \$100, is not invalid because it does not define the game of policy.²

§ 1275. **Disorderly houses.**—A city having power to "define and prevent disorderly conduct," and to "punish disorderly persons as defined by law," may provide for the punishment of keepers of and residents in houses of ill-fame;³ but under its power to suppress bawdy-houses, etc., to suppress indecent and disorderly conduct, to punish lewd behavior in public places, and to make ordinances to promote morals, etc., it cannot make one "whose known character is that of a prostitute" guilty, without more, of an offense.⁴ Nor does a charter giving power to punish prostitutes, and a general law providing for the suppression of bawdy-houses and the punishment of keepers thereof, authorize an ordinance making it an offense to resort to a house of ill-fame for lewdness.⁵

¹ *People v. Hess* (Mich.), 48 N. W. Rep. 181.

² *State v. Carpenter*, 60 Conn. 27; s. c., 22 Atl. Rep. 497. Under the constitution of California, article 11, sections 7, 11, authorizing the city and county of San Francisco to make and enforce within its limits such police regulations as are not in conflict with general laws, an ordinance prohibiting the sale of pools, etc., on horse-races, "except within the inclosure of a race track where such trial or contest is to take place," is valid, since, though its incidental effect may be to confer special privileges on the owners of race tracks, its purpose is to restrain gambling of the character mentioned, which is

a proper subject of police regulation. *Ex parte Tuttle*, 91 Cal. 589; s. c., 27 Pac. Rep. 933.

³ "The keeper of a house of ill-fame is a disorderly person, and his conduct tends to disturb the peace of the community where the brothel is located, and it did not need legislation to declare him such." *People v. Miller*, 38 Hun, 82.

⁴ *Buell v. State*, 45 Ark. 336, followed in *Paralee v. State*, — Ark. —; s. c., 4 S. W. Rep. 654, where it was held that the mere presence within the town limits of one who had previously lived there as a prostitute could not be made a crime.

⁵ *Ogden City v. McLaughlin* (Utah), 16 Pac. Rep. 721. Complaint for

§ 1276. Distribution of hand-bills.—An ordinance of the city of Detroit prohibiting the circulation, distribution or giving away of circulars, hand-bills or advertising cards of any description in or upon any of the public streets and alleys of the city was held not to come within the power granted by its charter.¹

§ 1277. Ordaining offenses — Criminal intent.—Although it is a general rule that no crime can be committed without a criminal intent, the rule is not universal. Many statutes which are in the nature of police regulations impose penalties irrespective of any intent to violate them: "the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."² Thus a city ordi-

keeping house of assignation need not allege all the circumstances contained in the ordinance. Same precision as in indictments not required. *State v. Baker* (La.), 10 So. Rep. 405. Punishment for visiting disorderly house pronounced excessive beyond reason. *In re Ah You* (Cal.), 25 Pac. Rep. 974.

¹ There was an express power to provide for cleaning the highways, etc., of dirt, mud, filth and other substances; also to prevent the incumbering or obstructing of streets, etc., and to control, prescribe and regulate the manner in which the highways, streets, etc., should be used and enjoyed, as well as to prohibit and prevent the flying of kites, and all practices, amusements and doings therein having a tendency to frighten teams and horses, or dangerous to life and property. *People v. Armstrong* (1889), 73 Mich. 288. The court said:—"The reasonableness or unreasonableness of an ordinance is not determined by the enormity of some offense it seeks to prevent and punish, but by its actual operation in all cases that may be brought thereunder. . . . What direction or restraint is required for the public good in the mere act of

giving away an advertising card or hand-bill? This part of the ordinance is not aimed at the littering up of the streets, or to the frightening of horses, but the offense is made complete in itself by the mere act of distributing or giving away these enumerated articles." See, also, *In re Frazee*, 63 Mich. 396.

² *People v. Roby*, 52 Mich. 577, a conviction for violation of a statute requiring saloons to be closed on Sundays by opening it for the purpose of cleaning it. See, also, for illustrations of crimes not dependent upon intent, *Commonwealth v. Boynton*, 2 Allen, 160; *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Holbrook*, 10 Allen, 200; *Commonwealth v. Waite*, 11 Allen, 264; *Commonwealth v. Smith*, 103 Mass. 444; *State v. Smith*, 10 R. I. 258; *Beckham v. Nacke*, 56 Mo. 546; *Commonwealth v. Raymond*, 97 Mass. 567; *King v. Dixon*, 3 M. & S. 11; *State v. Steamboat Co.*, 13 Md. 181; *Queen v. Bishop*, 5 Q. B. Div. 259; *Commonwealth v. Nichols*, 10 Met. 259; *Noecker v. People*, 91 Ill. 494; *Barnes v. State*, 19 Conn. 398; *Faulks v. People*, 39 Mich. 200; *State v. Hartfield*, 24 Wis. 60; *McCutcheon v. People*, 69

nance making it an offense to indecently expose the person in the streets, lanes or alleys of the city is a valid exercise of the police power.¹

Ill. 601; *Farmer v. People*, 77 Ill. 322; *Ulrich v. Commonwealth*, 6 Bush, 400; *State v. Cain*, 9 West Va. 559; *Commonwealth v. Emmons*, 98 Mass. 6; *Redmond v. State*, 36 Ark. 58; *Commonwealth v. Finnegan*, 124 Mass. 324; *Commonwealth v. Wentworth*, 118 Mass. 441; *Fox v. State*, 3 Tex. App. 329; *Queen v. Prince*, L. R. 2 Cr. Cas. 154; *State v. Newton*, 44 Iowa, 45; *People v. Waldvogel*, 49 Mich. 337.

¹The language of the ordinance was, "no person shall make any indecent exposure," etc., and it was

held that the complaint was sufficient if it followed the ordinance. "An exposure purely accidental," said the court, "is not covered by the ordinance. The terms employed in both the ordinance and complaint imply an affirmative, voluntary act on the part of the accused." *City of Grand Rapids v. Bateman* (Mich., 1892), 53 N. W. Rep. 6. As to what may be pronounced indecent exposure within constitutional principles, see *Tiedeman's Limitations of Police Power*, 155.

. CHAPTER XXXI.

MUNICIPAL COURTS AND RECORDS.

(a) MUNICIPAL COURTS.

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(a) MUNICIPAL COURTS.

§ 1278. *Introductory.*— The fundamental principle of the common law, derived doubtless from the ancient doctrine of the divine right of kings, was that every power, including the judicial, was a prerogative of the throne. Thus upon an examination of English history we find that it was the king who granted corporation charters to cities, which charters frequently contained grants or franchises of holding municipal courts.¹ Stephen (for instance) says: —“ These charters from the earliest times contained grants of courts of various

¹ 1 Kyd on Corporations, §§ 70, 182, 272; 1 Bac. Abr.; 4 Inst. 78, 224; Cro. 327; Wood, Inst. 205, 111; 2 Bl. Com. Jac. 313; Haddock's Case, Raymond, 37; 3 Bl. Com. 30, 80; 4 Bl. Com., 435.

degrees of importance. The mayor and aldermen were, in some cases, made magistrates *ex officio*, and authorized to hold courts of quarter sessions; and these grants were accompanied or not, as the case might be, by a clause called the '*non intro-mittant* clause,' which ousted the jurisdiction of the county magistrates. In some cases towns were made counties of themselves."¹ In England such a franchise having once been granted it was considered a public right, and consequently could never be lost by non-user no matter how long continued;² In America we shall find that the same power which confers the right frequently abolishes it.

§ 1279. The same subject continued — Scope of subject. Municipal courts in our country are known by a variety of names, such as mayor's, recorder's, corporation, hustings, inferior and police courts, and while their jurisdiction is to a large degree similar in the various States, there seems a tendency in some States to increase their authority to such an extent that it passes beyond what might be ordinarily considered their technical boundaries; thus, for example, it was held in Alabama, in a very recent decision, that the acts of that State gave "the judge of the city court of Selma all the powers and jurisdiction which are now, or may hereafter be, lawfully exercised by the judges of the circuit court and chancellors of the State."³ It will be the purpose of this chapter, in treating the subject of municipal courts, to conform that subject as far as possible to such courts in their narrower and more technical signification, although from what has just been said some latitude may be at times essential.

§ 1280. Creation — Abolition — Increase of power.—As in England towns owed their corporate existence and powers to the will of the king, so in our country the legislature, representing the sovereign State, or the constitution, expressing the sovereign will of the people, are the only sources of municipal

¹ Stephen's History of Criminal Law, p. 116.

² *Rex v. Wells*, 4 D. P. C. 562; *Rex v. Hastings*, 1 Barn. & Ald. 148; *Rex v. Havering-atte-Bowerr*, 5 Barn. & Ald. 291.

³ *Bledsoe v. Gary* (Ala., 1892), 10 So. Rep. 502. See, also, *Iron Works v. Elgin Ry. Co.* (Ill., 1892), 30 N. E. Rep. 1050; *Glove & Co. Mills v. Brought* (1892), 19 N. Y. Supl. 176.

corporate rights; to statute law and decisions thereupon we must therefore refer in order to discover the principles governing the creation and jurisdiction of municipal courts; and the law seems to be well settled that, while such courts exist almost solely for the benefit of cities and the enforcement of their local authority, still the legislature, acting in accordance with the State constitution, alone can call them into existence and define their powers.¹ It also seems to be very clear both upon reason and authority that there can be no implication of the right to hold a municipal court, and that the creative power can in no sense be delegated by the legislature to the municipality. Thus it was held in a very recent case in the Supreme Court of California that the legislature and governor, being the law-making power, alone could establish a municipal court and define its jurisdiction, and that consequently a municipal charter adopted by approval could not establish a municipal court, even though the legislature subsequently sanctioned the same by its resolution of approval.² As the legislature alone can establish courts for municipal purposes, so also by its act only can their existence and powers be terminated;³ and such termination divests the officers of such court of all their authority.⁴ And there may be an implied as well as an express abolition of a municipal court.⁵

¹ *People v. Wilson*, 15 Ill. 389; *State v. Young*, 3 Kan. 445; *People v. Curley* (1880), 5 Colo. 412; *Graham v. State*, 1 Pike (Ark.), 171; *In re Cahill*, 110 Pa. St. 167; *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146; *Mankato v. Arnold* (1886), 36 Minn. 62; *Perkins v. Corbin* (1871), 45 Ala. 103; *Baton Rouge v. Dearing*, 15 La. Ann. 208; *Missouri v. Lewis* (1879), 101 U. S. 22.

² *People v. Toal* (Cal., 1890), 23 Pac. Rep. 203. See, also, *Ex parte Reily* (1890), 85 Cal. 632; *In re Cloherty*, 2 Wash. St. 137; *Barter v. Commonwealth*, 3 Pa. 253; *Weeks v. City Treasurer*, 16 N. J. Law, 237; *Thomas v. Ashland*, 12 Ohio St. 124. But see dissenting opinion of Beatty, C. J., in case of *People v. Toal*, *supra*, who

said, referring to the charter creating a municipal court, "Such charters are laws; the legislature must approve the charter; therefore, what the charter establishes the legislature establishes. The charter is a law; therefore the jurisdiction conferred by it is conferred by law." Pp. 342, 343.

³ *Tesh v. Commonwealth*, 4 Dana (Ky.), 522; *Boyd v. Chambers*, 78 Ky. 140; *Vason v. Augusta*, 38 Ga. 542.

⁴ *Perkins v. Corbin* (1871), 45 Ala. 103; *Hagerstown v. Deckert*, 32 Md. 369.

⁵ *State v. Henshaw* (1888), 76 Cal. 436; *Hagerstown v. Deckert*, 32 Md. 369. In Maryland the legislature cannot confer judicial powers. *Vason v. Augusta*, 38 Ga. 542. But see

§ 1281. **The same subject continued.**—The legislature may also pass acts increasing the number of municipal courts and magistrates and may enlarge their powers, and may confer a greater jurisdiction upon some courts than upon others; but it would seem that unless municipal courts are to lose their technical characteristics as such, their jurisdiction must be confined within certain defined limits.¹ But on the other hand, it was held in Virginia that the legislature may enlarge the powers of a corporation, giving them jurisdiction greater even than a circuit court.²

§ 1282. **Jurisdiction—Criminal, civil and special.**—It has already been stated that there seems a tendency to enlarge the powers of municipal courts, and cases have been cited illustrative of this; nevertheless it is submitted that upon examination of these cases it will be found that the courts therein mentioned are not strictly municipal courts within the technical meaning of that term, if by that term we understand courts exercising jurisdiction co-extensive only with corporate limits. And that upon careful inquiry we will find that a municipal court *per se* is one exercising a jurisdiction within certain defined and more or less narrow confines; and that while in the various States its exact boundaries may shift to a certain extent, the underlying principle of jurisdiction is to a large degree uniform. Such courts are from their very nature of inferior jurisdiction, and are confined in their adjudication to such matters as arise within the particular corporate territory for which they are created. Very frequently they are not courts of record. Nor do their judges fall within the constitutional meaning of such.³ Owing to the fact that

Alexander v. Bennett, 60 N. Y. 204, which decides that where State constitutions continue the powers and jurisdiction of certain inferior courts, no subsequent legislature can take away such jurisdiction.

¹State v. Helfrid, 2 Nott & McCord (S. C.), 233; *In re Cahill*, 110 Pa. St. 167; *State v. Crane* (Me., 1892), 24 Atl. Rep. 853; *Landers v. Staten Island R. Co.*, 53 N. Y. 450.

²Chahoon's Case, 21 Gratt. 822.

See, also, *Bledsoe v. Gray* (Ala., 1892), 10 So. Rep. 502. But it was held in *Nickman v. O'Neil*, 10 Cal. 294, that the power conferred by a legislature upon a municipal court to send its process beyond its territorial limits, did not enlarge its jurisdiction, but only the method of enforcing its powers. See § 1287, *infra*, "Jurisdictional limitation."

³*Richmond Mayoralty Case*, 19 Gratt. 673; *Egleston v. City Council*,

the most ordinary exercise of their power is in the enforcement of municipal ordinances passed for the preservation of peace and order in cities, criminal or *quasi*-criminal jurisdiction is peculiarly their province; but inasmuch as a rule their method of procedure is summary, it would seem that criminal offenses, as applicable to them, are confined to such as are not felonies or crimes against the general law, but simply petty offenses, amounting in some cases to misdemeanors punishable by fine or by fine and a limited imprisonment.¹

§ 1283. *The same subject continued.*—Under certain circumstances and in certain States the legislature has conferred also a limited civil jurisdiction upon these courts. Thus in New Jersey the recorder of the town of New Brunswick is authorized under a certain act to try civil suits within the jurisdiction of a justice of the peace, and it was decided that the civil jurisdiction of a justice of the peace may also be conferred upon the mayor of a city.² On the other hand it was held in North Carolina that the legislature could not constitutionally confer the judicial powers of a justice of the peace in civil cases upon a mayor.³ But it would seem, as stated, that a limited civil jurisdiction is frequently conferred upon these courts, and that there is a growing tendency to enlarge the same.⁴ It was held in Georgia that where

1 Mills, Const. (S. C.) 45; Grand Rapids &c. R. Co. v. Gray, 38 Mich. 461; *In re Stratman*, 39 Cal. 517; Nugent v. State, 18 Ala. 521.

¹ *Ex parte Slattery*, 3 Ark. 484; Meyers v. People, 26 Ill. 173; Commonwealth v. Pindar, 11 Met. 539; Rector v. State, 6 Ark. 187; Dun v. Howard, 6 Ark. 461; St. Peter v. Bauer, 19 Minn. 327; State v. Pender, 66 N. C. 313; Commonwealth v. Roark, 8 Cush. 210; Goodrich v. Brown, 30 Iowa, 291; People v. Wong Wang (1891), 92 Cal. 277; People v. Ah Ung (Cal., 1891), 28 Pac. Rep. 272; Brown's Case (1890), 152 Mass. 1; People v. Hulett (1891), 15 N. Y. Supl. 630; People v. Brown, 80 Mich. 615; People v. Gooseman, 80

Mich. 611; State v. Crane (Me., 1892), 24 Atl. Rep. 853; City Council v. Pepper, 1 Rich. (S. C.) Law, 364; City Council v. King, 4 McCord (S. C.), 487; Lewis v. State, 21 Ark. 209.

² *Hutchings v. Scott*, 9 N. J. Law, 218.

³ *Edenton v. Wool*, 65 N. C. 379.

⁴ *Iron Works v. Elgin &c. Ry. Co.* (Ill., 1892), 30 N. E. Rep. 1050; *Globe &c. Mills v. Bilbrough* (1892), 19 N. Y. Supl. 176; *Bledsoe v. Gary* (Ala., 1892), 10 So. Rep. 502; *Pressel v. Bice* (1891), 142 Pa. St. 263; *Callahan v. Mayor*, 66 N. Y. 656; *Cincinnati v. Gwynne*, 10 Ohio St. 192; *Brown v. Jerome* (1892), 102 Ill. 371; *Stimson's Statute Law*, 120, 122. Questions of title to real estate apparently not

a statute declared certain offenses crimes against the State, a city cannot make the same offenses against the city triable summarily in a municipal court; that this would be unconstitutional.¹ But in New Jersey it was held that the same offense may be one against the State and against the municipality; hence both may punish constitutionally.² In the various States certain special powers and jurisdiction have been conferred, but it will generally be found that these are in keeping with the local character of the municipal court.³

§ 1284. Summary powers.—By far the largest number of decisions in the matter of municipal courts principally turn upon the question of their power to act summarily in the enforcement of their criminal or *quasi*-criminal jurisdiction, and yet upon the proper and constitutional exercise of this right mainly depends the efficiency and usefulness of these courts. Whenever such a method of procedure is put in action it must necessarily be in a certain sense and to a certain degree in derogation of the fundamental principles of Magna Charta, the essential provisions of which form the substance of our national and State constitutions and are justly prized as the bulwark of American liberty, namely, the right of every citizen accused of crime to presentment duly predicated upon a careful weighing of evidence by unbiased fellow-citizens, and after presentment a prosecution before an impartial jury of

cognizable before a municipal court. *Warwick v. Mayo*, 15 Gratt. 528; *Bailey v. Winn* (1890), 101 Mo. 649.

¹ *Jenkins v. Thomasville*, 35 Ga. 145. See language of Lumpkin, C. J., who says:—"The line is not very accurately drawn where municipal power ends and State authority begins." P. 147. *Savannah v. Hussay*, 21 Ga. 80; *People v. Hyland*, 41 Cal. 129.

² *Howe v. Plainfield*, 37 N. J. Law, 145; *State v. Lee*, 29 Minn. 445.

³ *Fayette v. Shafroth*, 25 Mo. 445; *Willis v. Boonville*, 28 Mo. 543; *Myers v. People*, 26 Ill. 173; *Malone v. Murphy*, 2 Kan. 250; *Rice v. State*, 2 Kan. 141; *Elder v. Dwight Mfg.*

Co., 4 Gray, 201; *State v. Ricker*, 32 N. H. 179. In this case it was held that a police court of a town had by statute jurisdiction of cases of complaints committed anywhere in the county where warrant of arrest was issued in the town returnable before that court. *Ex parte Halstead* (1891), 97 Cal. 471; *Carroll v. Langan* (1892), 63 Hun. 380. Upon jurisdiction generally, see *Robinson v. Benton County* (1886), 49 Ark. 49; *Davis v. Woolhaugh*, 9 Iowa, 104; *Nesbit v. Matthews*, 16 N. Y. Supl. 202; *Iron Works v. Elgin &c. Ry. Co. (Ill.)*, 30 N. E. Rep. 1050; *Cross v. Hecker* (1892), 24 Atl. Rep. 99.

his peers. And yet it will readily be seen that such a cumbersome method will not be effectual in the bringing to justice of those who commit petty municipal offenses, and that, as has been said more than once by the courts, such a requirement would defeat the very object for which municipal courts were created and greatly hinder the efficiency of their procedure. It was said in a very late case that the provision of the constitution guarantying jury trial was designed to embrace such prosecutions "as at the time of its adoption, by the course of law, were triable by a jury. There was at that time and always had existed a class of criminal cases which were proceeded against summarily and without the intervention of a jury. . . . The power to dispose of them summarily was undoubted."¹

§ 1285. **The same subject continued.**—While the decisions are by no means uniform in the various States, and in some cases it has been seemingly denied that in any instance could a municipal court exercise summary powers,² the better and more uniform rule appears to be, that courts created for corporate communities must needs frequently act in a summary way. Upon an examination of the authorities the following principles seem clearly to underlie and form the *rationale*, so to speak, of this method of procedure:—The exercise of the power is confined to cases which properly fall within

¹United States v. Green, 19 D. C. 230, pp. 238, 239. See, also, *Calan v. Wilson*, 127 U. S. 540; *State v. Glenn* (1880), 54 Md. 605; *State v. Mayor*, 12 Rich. (S. C.) 480; *New Orleans v. Costello*, 14 La. Ann. 37; *Hill v. Dalton*, 72 Ga. 314. In this case the court said:—"It is well settled that such is the law, the constitutional law; for if no man could be fined or imprisoned for violation of a city police ordinance except by a jury trial on indictment, away would go all power in our municipal authorities to preserve peace and good order within their corporate limits." *State v. Gutierrez*, 15 La. Ann. 190; *People v. Justices*, 74 N. Y. 406; *Byers*

v. Commonwealth, 42 Pa. St. 89; *McGear v. Woodruff*, 33 N. J. Law, 213; *Ex parte Schmidt* (1885), 24 S. C. 363; *State v. Powell*, 97 N. C. 417; *Tims v. The State*, 26 Ala. 165; *Murphey v. People*, 2 Cowen, 815; *In re Powers*, 25 Vt. 261; *Lowe v. Commissioners*, R. M. Charl. (Ga.) 302; *In re Pennsylvania Hall*, 5 Pa. St. 204; *McGarty v. Deeming* (1883), 51 Cal. 422.

²*Burns v. Le Grange*, 17 Texas, 415; *Scully v. O'Seary*, 11 Chicago Legal News, 27; *State v. Moss*, 2 Jones (N. C.), 66; *Smith v. San Antonio*, 17 Texas, 643; *Dubuque v. Rebman*, 1 Iowa, 444; *Plimpton v. Summerset*, 33 Vt. 283; *Beaufort v. Ohlandt* (1885), 24 S. C. 158.

police surveillance; it has to do with the prosecution and punishment of infringements of local ordinances and by-laws, which, while they may possess a *quasi*-criminal character, are in reality only petty offenses against the peace and order of the special locality wherein they are committed; are punishable by fine, or, if by imprisonment also, the latter is of only a temporary character and generally not in the same place nor surrounded by the same penal circumstances as in the case of grievous public crimes; in a word, such offenses are not "criminal" and "infamous" in the meaning of those words as found in the various constitutions. But it is also well settled that in no sense can the summary jurisdiction of these courts be evoked where the offense committed is one to which at common law, or at the adoption of the State constitution, attached the rights of presentment, indictment and trial by jury; in all such cases these rights are inviolate. But it is equally clear that the legislature may declare new offenses which were non-existent at common law and at the adoption of the constitution, and prescribe the method of trial of such offenses, authorizing trial of them in a summary way; and such a proceeding is not a suit at common law, but a criminal statutory proceeding.¹

§ 1286. The same subject continued — Felonies and misdemeanors.—It was held in Wisconsin that in no case of felony could the right of trial by jury in a criminal case be waived, and that in cases of misdemeanor the current of authority was the same way;² and in Arkansas that all offenses below the grade of felony can constitutionally be vested by the General Assembly in a corporation court.³ These cases are, however, in line with the current of decisions, for they clearly refer in "felonies" and "misdemeanors" to crimes against the State; and it is very evident that whenever the in-

¹ Van Swarton v. Commonwealth, Kansas, 758; Howe v. Plainfield, 37 24 Pa. St. 131; Markle v. Akron, 14 N. J. Law, 145; State v. Colin, 27 Ohio, 586; Monroe v. Meuer (1883), Vt. 318; Trigally v. Memphis, 6 35 La. Ann. 1192; Williams v. Augusta, 4 Ga. 509; Slaughter v. People, Coldw. (Tenn.) 382; Work v. State, 2 2 Doug. (Mich.) 334; Floyd v. Commissioners, 14 Ga. 354; Shafer v. Mumma, 17 Md. 331; *In re Rolfs*, 30

Kansas, 758; Howe v. Plainfield, 37 24 Pa. St. 131; Markle v. Akron, 14 N. J. Law, 145; State v. Colin, 27 Ohio, 586; Monroe v. Meuer (1883), Vt. 318; Trigally v. Memphis, 6 35 La. Ann. 1192; Williams v. Augusta, 4 Ga. 509; Slaughter v. People, Coldw. (Tenn.) 382; Work v. State, 2 2 Doug. (Mich.) 334; Floyd v. Commissioners, 14 Ga. 354; Shafer v. Mumma, 17 Md. 331; *In re Rolfs*, 30

² State v. Lockwood (1878), 43 Wis. 403.

³ *Ex parte Slattery*, 3 Ark. 484.

fringement of town ordinances rises to the gravity of such, a jury trial is the inalienable right of the accused, nor can any legislative act deprive him thereof.¹ It may be added that it has been held that restrictions upon the right of these courts, acting in a summary way, are not governed by nor are they within the purview of the constitution of the United States, but only of the State constitutions. The former has to do with restrictions upon federal power, and is not intended in any manner to prohibit the legislatures of the different States from conferring such jurisdiction, summary or otherwise, as they may deem proper, upon municipal courts, so long as they keep within the specific provisions of the constitutions of their respective States.²

§ 1287. Jurisdictional limitation.— Like the corporate cities for whose uses and purposes they are created, municipal courts owe their authority and existence to statutory enactment, although, as has already been stated, cities sometimes enjoyed at common law what was known as the franchise of holding a court; therefore they are from their very nature of only a limited jurisdiction territorially.³ And in every instance it seems well settled that the statutes defining their jurisdiction must be strictly construed, and that jurisdiction is substantially confined within the limits of those powers expressly given by statute; thus, for example, it was held that where a statute gave a municipal court jurisdiction over an individual or corporation, where there is a demand “for money only,”

¹ *United States v. Green*, 19 D. C. 230; *Cooley on Const. Lim.* 319, 410; *Proffat's Jury Trials*, sec. 113; *Neales v. State*, 10 Mo. 498; *State v. Mansfield*, 41 Mo. 470; *Commonwealth v. Shaw*, 1 Pittsburgh (Pa.), 492; *Moundsville v. Fountain*, 27 West Va. 182; *State v. Topeka* (1886), 36 Kan. 76. In this case it was held that the provision in the Bill of Rights, that “in all prosecutions the accused shall be allowed . . . to have . . . a speedy trial by an impartial jury,” applied to criminal prosecutions for violations of laws of the State, and not to that of city ordi-

nances appertaining to local affairs of the city.

² *State v. Wells*, 46 Iowa, 662; *Boring v. Williams*, 17 Ala. 510. But see *Portland v. Bangor* (1876), 65 Me. 120, where a contrary doctrine is expressed, overruling *Nott's Case*, 11 Me. 208, and *Portland v. Bangor*, 42 Me. 403.

³ *Herschoff v. Beverly* (1881), 43 N. J. Law. 139; *Bonner v. McPhail*, 31 Barb. 106; *Stanhart v. Sittey* (N. J.), 19 Atl. Rep. 464; *Grand Rapids &c. R. Co. v. Gray* (1878), 38 Mich. 461; *In re City of Buffalo*, 18 N. Y. Supl. 771.

such court had no jurisdiction to give not only a judgment for the money claimed, but also to determine that defendant was not entitled thereto as a trustee.¹ Yet while this is clearly the law, any powers which can naturally or necessarily be inferred from those expressly given have been frequently held to be within their jurisdiction; for example, it was decided in Maine that although the Declaration of Rights of that State declares that no person shall be tried for a capital offense or infamous crime except on presentment by a grand jury, nevertheless where one is charged with assault and battery, confessedly an infamous crime, judgment thereof was within the jurisdiction of a trial justice of the city of Portland, owing to the possible smallness of the punishment arising from the circumstances.²

§ 1288. The same subject continued — Constitutional limitations.—It may safely be asserted that the influence of Magna Charta will never pass away, and inasmuch as its provisions have been embodied substantially in the constitutions of the various States of the Union, we naturally find that there is also this further limit to the jurisdiction of municipal courts, namely, that they can exercise no powers in any wise at variance with the provisions of that highest of all State laws, the Bill of Rights. Thus the Supreme Court of Michigan said in reference to the police court of Grand Rapids:—“The statute which attempts to give this court jurisdiction over misdemeanors in general cannot exercise that power for want of indispensable means to carry it out. Those powers

¹ *Hunt v. Genet* (N. Y.), 14 Daly, 225. See, also, *Gray v. State* (Del.), 2 Harring. 76; *Zylstra v. Charleston* (S. C.), 1 Bay, 382; *Rohland v. St. Louis &c. Ry. Co.*, 89 Mo. 180; *People v. Stott* (Mich.), 51 N. W. Rep. 509; *White v. Levy*, 93 Ala. 484; s. c., 8 So. Rep. 563; *In re Ah You*, 82 Cal. 339.

² *State v. Crane* (1892), 84 Me. 271; s. c., 24 Atl. Rep. 853. The common-law test of the magnitude of the offense was deemed to have been changed by the statute, under which a mere nominal fine might be im-

posed. *Town of Henderson v. Davis*, 106 N. C. 88; *People v. Gooseman* (1890), 80 Mich. 611; *People v. Brown*, 80 Mich. 615; *Georgia State Building & Loan Ass'n v. Owens*, 88 Ga. 224; s. c., 14 S. E. Rep. 210; *McCrea v. Jacobs*, 19 Abb. N. C. 188; *City of Charleston v. Ashley Phosphate Co.*, 34 S. C. 541; s. c., 11 S. E. Rep. 386; *Wheeler v. Bowery Sav. B'k*, 20 Abb. N. C. 243; *In re Knoop's Estate*, 11 N. Y. Supl. 773; *Price v. Grant*, 7 N. Y. Supl. 904; *Ex parte Burnett* (1857), 30 Ala. 461.

cannot be given to it without changing its entire character. . . . It is certain no court can be so constituted as to deprive either the public or criminals of their substantial rights. As we had occasion to suggest before, the judicial system of the State is not within legislative discretion except to a limited extent. . . . This police act has got beyond any range which the constitution recognizes.”¹

§ 1289. Qualifications of officers — Judges and jurors.—

A casual examination of cases upon this point would lead one to suppose that there was scarcely any uniformity, and that not only were the different States in conflict upon the eligibility of residents and tax-payers of municipalities to sit as judges, jurors or witnesses in their local courts, but that the appellate court of the same State leaned now to one and now to a contrary opinion; but a little closer scrutiny dissolves the difficulty and reconciles the apparent want of harmony. The rule seems to be that when the city itself is a party, and an interested party in the proceeding, or when the city is being sued in its corporate capacity, or is liable thereby to pecuniary loss or gain, then in such proceeding a resident taxpayer is not competent to sit as a juror; and presumably the same disqualification extends to a judge.² But when the suit is only for the enforcement of a city ordinance by prosecution, the penalty being a fine or limited imprisonment, then a resident tax-payer and citizen is competent to sit either as

¹ *People v. Marigold* (1887), 71 Mich. 335; *Montross v. State*, 61 Miss. 429. But see *Ex parte Samuel J. Peacock*, 25 Fla. 478, and *Kirchenor v. George C. Flint & Co.*, 11 N. Y. Supl. 741; *Seitzinger v. Steinberger* (1849), 12 Pa. St. 379. In *Ex parte Ah You*, 82 Cal. 339, Fox, J., said in a dissenting opinion:—"If there is one thing more manifest than another in this constitution, it is an intent to commit to the people of municipalities the management of their own local affairs, but in such a form as not to interfere with or create confusion in the administration of the general laws of the State." See, also, *Grand Rapids &c. R. Co. v.*

Grey, 38 Mich. 461; *Fox v. Ellison*, 43 Minn. 41; s. c., 44 N. W. Rep. 671; *Cross v. Hecker* (Md.), 24 Atl. Rep. 99; *Mayor &c. of Balt. v. State*, 15 Md. 376; 1 *Dillon on Munic. Corp.* (4th ed.), § 427, and cases cited.

² *Fulweiler v. St. Louis*, 61 Mo. 479; *Dively v. Cedar Falls*, 21 Iowa, 565; *Davenport &c. Co. v. Davenport*, 13 Iowa, 229; *Johnson v. Americus*, 46 Ga. 80; *Cartersville v. Lyon*, 69 Ga. 577; *Boston v. Baldwin*, 139 Mass. 315; *Kindinger v. Saginaw* (1886), 59 Mich. 355; *Diveny v. Elmira*, 51 N. Y. 506. This case held that the charter could remove disqualification.

juror or a judge.¹ One may also be disqualified from acting as a judge in a municipal court by reason of the fact that he holds another office of public trust, such as governor, lieutenant-governor, councilor or representative.² Nor can a mayor who is elected for one year act as a justice of the peace when the latter officer's tenure is by virtue of the State constitution of four years' duration.³ The constitution and the legislature may also directly or impliedly disqualify a citizen under certain circumstances from occupying a position as judge in a municipal court.⁴ But on the contrary the constitution may clearly empower a mayor to act judicially as well as to fulfill his executive functions.⁵

§ 1290. Appeals.—Sufficient has already been said to show that municipal courts derive their authority and jurisdiction from enactment of the legislature or by virtue of some clause in the State constitution alone, and that their powers are only those which are expressly given thereby; but it would seem from one class of cases that the right of appeal from their adjudications was one which need not be expressly provided for, but which, unless clearly and unequivocally taken away, would necessarily exist.⁶ At common law the right of appeal existed, and so in the absence of a provision therefor the right would seem to exist.⁷ Of course where the right is expressly conferred by statute it is needless to say that it exists.⁸

¹ *Commonwealth v. Ryan*, 5 Mass. 90; *State v. Wells*, 46 Iowa, 662; *Lexington v. Long*, 31 Mo. 369; *Montezuma v. Minor* (1884), 73 Ga. 484; *City Council v. Pepper*, 1 Rich. (S. C.) 364; *City Council v. King*, 4 McCord (S. C.), 487; *Thomas v. Mount Vernon*, 9 Ohio, 290. But see in direct conflict with the view expressed in the text, *Omaha v. Olmstead*, 5 Neb. 446; *Kemper v. Louisville*, 14 Bush (Ky.), 87.

² *Commonwealth v. Hawkes* (1878), 123 Mass. 525; *Howard v. Shoemaker*, 35 Ind. 111. Cf. *Commonwealth v. Dallas*, 3 Yeates (Pa.), 300.

³ *State v. Maynard*, 14 Ill. 419; *Beesman v. Peoria*, 16 Ill. 484.

⁴ *Lafon v. Dufroy*, 9 La. Ann. 350; *Wheeling v. Black* (1884), 25 West Va. 266.

⁵ *Waldo v. Wallace*, 12 Ind. 569; *Gulick v. New*, 14 Ind. 93. See, also, *Commonwealth v. Emory*, 11 Cush. 406.

⁶ *In re Heath*, 3 Hill, 42, 52; *Dubuque v. Rebman*, 1 Iowa, 444; *Conboy v. Iowa City*, 2 Iowa, 90.

⁷ *Camden v. Blocks*, 65 Ala. 236; *Beaufort v. Ohlandt* (1885), 24 S. C. 158; *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146; *Starr v. Trustees*, 6 Wend. 564.

⁸ *Moundsville v. Fountain*, 27 West Va. 182; *Muscatine v. Steck*, 7 Iowa, 505.

And it was held in Alabama that, while the legislature could confer summary jurisdiction upon justices of the peace, still that the act must provide for an appeal or it would be unconstitutional.¹ Sometimes the statute conferring the jurisdiction either limits the right of appeal or altogether denies it, but generally in criminal prosecutions it would seem that the right of appeal *vel non* is determined according to the amount of the fine.² It was held, however, in Michigan that an appeal would not lie from the police court of Detroit to the circuit court of Wayne county because the right was not expressly given.³ Sometimes the acts of an inferior municipal court may be purely administrative and not in any true sense judicial; from such acts neither appeal nor *certiorari* will lie.⁴

§ 1291. Method of procedure.—In courts of inferior jurisdiction, such as municipal courts, the object of whose existence is the speedy and inexpensive enforcement of local laws, we would naturally not expect to find the same formal requisites of pleading and procedure as are more or less at-

¹ *Tims v. The State*, 26 Ala. 165.

² *Tierney v. Dodge*, 9 Minn. 166; *Willis v. Boonville*, 28 Mo. 543; *McGarty v. Deeming* (1883), 51 Conn. 422; *In re Canal &c.*, 12 N. Y. 406; *New York &c. R. Co. v. Marvin*, 11 N. Y. 276. *Elliott v. Palmer*, 10 Pa. Co. Ct. Rep. 427, held that the right of appeal from a justice of the peace was determined by the amount of judgment and not that of the claim, while in *Koetke v. Ringer* (1891), 46 Minn. 259, an exactly contrary doctrine was held. See, also, *Norton v. Petrie* (1890), 59 Conn. 200; *State v. Folwell* (1890), 20 Atl. Rep. 1079. A person can appeal from a justice's court from a judgment in a matter over which the justice had no jurisdiction, or he may have *certiorari*.

³ *People v. Police Justices*, 7 Mich. 456. See, also, *State v. Jackson*, 8 Mich. 110. Inasmuch as municipal courts owe their very existence to

statutory or constitutional enactment, it is a consistent doctrine which makes the right of appeal depend upon whether or not the legislature has expressly or clearly conferred the same. See, also, *Henry v. Lansdowne* (1890), 42 Mo. App. 431; *Steven v. Insurance Co.* (1890), 29 Neb. 187; *Ballard v. Gray*, 108 N. C. 544; *Purcell v. Booth*, 6 Dak. 17; *Mayor v. Insurance Co.*, 15 Daly, 215; *Richards v. Bria*, 15 Daly, 144.

⁴ *Farley v. Commissioners* (1890), 126 Ind. 468; *People v. Mayor*, 2 Hill (N. Y.), 9. But *certiorari* lies to the judges of the court of common pleas on an appeal to them from the commissioners of highways. *Lawton v. Commissioners*, 2 Caines (N. Y.), 179. See, also, *Dixon v. Cincinnati*, 14 Ohio, 240; *Cunningham v. Squires*, 2 West Va. 425; *State v. Fowler* (N. J., 1890), 20 Atl. Rep. 1079.

tendant upon the trials of more serious offenses. Thus, when the legislature gives justices of the peace jurisdiction for the recovery of a penalty, no formal complaint is requisite.¹ And a complaint before a municipal tribunal for violation of a city ordinance is sufficient if it clearly refer to the ordinance. It need not be strictly framed nor set out the ordinance *in totidem verbis*.² But every fact necessary to confer jurisdiction must clearly and affirmatively appear.³ In a recent case in Wisconsin it was held that although a municipal court (which in this case was a court of record), required by law to be held in a certain city, did not lose its jurisdiction because its record failed to state the place to which an adjournment thereof was made; that a justice of the peace of the same place was required to state his place of adjournment, and if not, that his jurisdiction would be lost.⁴

§ 1292. The same subject continued.—Suits in municipal courts for violations of city ordinances and laws are variously brought in different States. In some States suits are instituted in the name of the city,⁵ or they may be brought in the name of the State,⁶ or again in the name of the "people of the State."⁷ Where one not an officer in the local tribunal acts under color of office (thus in such courts one may decide as a *de facto* judge), his decisions will be sustained.⁸ And

¹ *Ewbanks v. Ashley*, 36 Ill. 177.

² *Keeler v. Millidge*, 24 N. J. Law, 142; *Fink v. Milwaukee*, 17 Wis. 26; *Ex parte Lane* (1888), 76 Cal. 587; *State v. Baker* (La., 1892), 10 So. Rep. 405; *State v. Carpenter*, 60 Conn. 97; *Commonwealth v. Cutter* (Mass., 1892), 29 N. E. Rep. 1146; *City v. Kern* (Mont., 1892), 29 Pac. Rep. 720. Complaint must at least refer to ordinance. *State v. Dunbar*, 43 La. Ann. 86; *Durango v. Remsberg*, 16 Colo. 327; *Commonwealth v. Odenweller* (Mass., 1892), 30 N. E. Rep. 1022; *Charleston v. Ashley & Co.*, 34 S. C. 541; *Moundsville v. Velton*, 35 West Va. 679.

³ *Lowe v. Commissioners*, R. M.

Charlt. (Ga.) 302; *Muscatine v. Steck*, 7 Iowa, 505; *Truchelut v. City Council*, 1 Nott & McCord (S. C.), 227; *People v. Wong Wang* (1891), 92 Cal. 277; *People v. Ah Ung* (Cal., 1891), 28 Pac. Rep. 272; *Thornton v. Smith* (1792), 1 Wash. (Va.) Rep. 106.

⁴ *State v. Wright*, 80 Wis. 648.

⁵ *Williamson v. Commonwealth*, 4 B. Mon. (Ky.) 146; *Ex parte Holwedell*, 74 Mo. 395; *Davenport v. Bird*, 34 Iowa, 524.

⁶ *State v. Powell*, 97 N. C. 417.

⁷ *Brownville v. Cook*, 4 Neb. 110; *Pillsbury v. Brown*, 47 Cal. 478; *Godard, Petitioner*, 16 Pick. 501.

⁸ *Lewiston v. Proctor*, 23 Ill. 533; *State v. Carroll*, 38 Conn. 449.

it was held in Massachusetts that the proper way to oust a *de facto* officer was by information on behalf of the commonwealth.¹

(b) MUNICIPAL RECORDS.

§ 1293. Recording of ordinances.— Whether municipal ordinances shall or shall not be recorded is dependent upon statute; when a statute upon the subject is directory, it is not necessary to their validity that they be recorded.² But if the statute is mandatory in its terms recording is of course necessary.³ And wherever the statute prescribes legal formalities to be observed, these must be strictly followed.⁴ Thus in a recent case in Illinois it was held that where a statute commands that a city ordinance shall be published in a newspaper published in the city, then upon a production of the record, in order to prove the ordinance, all of the required facts must also be clearly shown.⁵ But every intendment of law is

¹Commonwealth v. Hawkes, 123 Mass. 525 (*quo warranto*). See, also, Fowler v. Bebee, 9 Mass. 231; Commonwealth v. Fowler, 10 Mass. 290; Sheehan's Case, 122 Mass. 445; Answer of Justices, 122 Mass. 600; Tyler v. State (1891), 63 Vt. 300; s. c., 21 Atl. Rep. 611; Rose v. St. Charles, 49 Mo. 509; Smith v. San Antonio, 17 Tex. 643. Where a party excepts to a mayor's jurisdiction but does not demand a jury trial, this does not prevent the proceeding of such mayor in imposing a fine without a jury trial from being set aside, because the party is entitled to a jury trial. Wheeling v. Black, 25 West Va. 266. Municipal courts take judicial notice of municipal ordinances.

²Irrigation District v. De Lappe, 79 Cal. 351; Erie Academy v. Erie, 31 Pa. St. 515; Amey v. Alleghaney, 24 How. 364; Tipton v. Norman, 72 Mo. 380; Barton v. Pittsburgh, 4 Brewst. (Pa.) 373; Whalin v. Maccomb, 76 Ill. 49; Uppington v. Oviatt, 24 Ohio St. 232; Wiggin v. Mayor,

9 Paige, 16; Stevenson v. Bay City, 26 Mich. 44; Stricker v. Kelly, 7 Hill, 9; Coleman's Case, 25 Gratt. 865. It was held in this case that whenever a written record of transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep the same, and when kept that it becomes a public record belonging to the office and not to the officer.

³Schwartz v. Oshkosh, 55 Wis. 490; State v. Union, 32 N. J. Law, 343; Marshall v. Commissioners, 59 Pa. St. 455.

⁴Elmendorf v. Mayor, 25 Wend. 693; Delphi v. Evans, 36 Ind. 90; In re Buffalo, 78 N. Y. 362; Steckert v. Saginaw, 22 Mich. 104; Olin v. Meyers, 55 Iowa, 209; Rich v. Chicago, 59 Ill. 286; McCormick v. Bay, 23 Mich. 457; Spangler v. Jacoby, 14 Ill. 297.

⁵Hutchisson v. Mt. Vernon (1891), 40 Ill. App. 19. Cf. People v. Wilson,

made in favor of the regularity of corporate and municipal acts and proceedings.¹

§ 1294. **Evidential character. — Originals**—Where records are kept of municipal acts and proceedings, the law is clearly defined that the same are receivable in evidence in proof of the facts therein recited; and it would seem to be a rule that when so produced they establish themselves, because they are made by accredited agents, are of a public nature and notoriety, and are usually made under the sanction of an oath of office.² It may and should be added in this connection that such records when produced in evidence should be properly identified.³ It was held in Massachusetts that the book of assessments for taxes, made and kept by the assessors in the performance of their official duty in accordance with the requirements of statute, is competent evidence of the facts therein stated in all cases relating to the assessment or col-

62 Hun, 618; *Walker v. Aurora* (1892), 29 N. E. Rep. 741.

¹ *Bank of United States v. Dandridge*, 12 Wheat. 64. See language of Mr. Justice Story at p. 69. *Lexington v. Headly*, 5 Bush (Ky.), 508; *Solomon v. Hughes* (1880), 24 Kan. 211; *Greeley v. Hamman* (Colo., 1891), 28 Pac. Rep. 460. See, also, and compare *Adams v. Mack*, 3 N. H. 493, where the court said:—"It is very clear that the doings of towns must be proved by their records," but that these need not be strictly judged.

² 1 Greenl. on Evidence (15th ed.), §§ 483, 484; 2 Am. & Eng. Encyc. of Law, 467; *Boston v. Weymouth*, 4 Cush. 538; *Toledo Ry. Co. v. Toledo Electric Ry. Co.*, 6 Ohio Cir. Ct. Rep. 362; *School District v. Blakeslee*, 13 Conn. 227; *Denning v. Roome*, 6 Wend. 651; *Wood v. Bank*, 9 Cowen 194; *State v. Van Winkle*, 25 N. J. Law, 73; *McFarlan v. Insurance Co.*, 4 Denio, 392; *Turnpike Co. v. McKean*, 11 Johns. 98; *Adams v. Mack*, 3 N. H. 493, *Stebbins v. Merritt*, 10 Cush. 27. Records of a town kept by an un-

sworn clerk are evidence of its proceedings, if verified by oath, when offered in evidence. See, also, *Hutchinson v. Pratt*, 11 Vt. 402; *Cass v. Bellows*, 31 N. H. 501; *St. Charles v. O'Mailley*, 18 Ill. 407; *Coleman's Case*, 25 Gratt. 865; *Owings v. Speed*, 5 Wheat. 420; *Commonwealth v. Hefron*, 102 Mass. 148; *Ronkendorff v. Taylor*, 4 Peters, 349; *People v. Murray* (1885), 57 Mich. 396; *St. Louis v. Foster*, 52 Mo. 513; *Tipton v. Norman* (1880), 72 Mo. 380; *People v. Maxton*, (Ill., 1891), 28 N. E. Rep. 1074; *Knight v. Kansas City &c. R. Co.*, 70 Mo. 231; *Kennedy v. Newman*, 1 Sandf. (N. Y.) 187; *Bailey v. State*, 30 Neb. 855; s. c., 47 N. W. Rep. 208; *Larkin v. Burlington &c. R. Co.* (Iowa, 1892), 52 N. W. Rep. 480; *Greeley v. Hamman* (Colo., 1891), 28 Pac. Rep. 460.

³ *Beaumont v. Wilkesbarre* (1891), 142 Pa. St. 198; *Greeley v. Hamman* (Colo., 1891), 28 Pac. Rep. 460; *Ottumwa v. Schaub*, 52 Iowa, 515. Identified by a policeman of town. *Rutherford v. Swink* (1891), 90 Tenn. 152; *Bank v. Hamlin*, 14 Mass. 178.

lection of a tax; but how far the same would be admissible for any other purpose, and in controversies between persons not claiming rights under it, is a question upon which the authorities are somewhat obscure.¹ It would appear that records are always evidence on behalf of or against the city touching the matters which they contain and to which they relate.²

§ 1295. The same subject continued — Copies.—In like manner copies of such records, when duly certified and authenticated by the proper officer, that is, the one by whom the originals are made, have equal weight with the originals and are receivable in evidence without further proof, forming thus an exception to the general rule of evidence excluding secondary when the best is procurable.³ But before the copy of a record can be received in evidence it would seem to be proper to show that its contents are of a character required to be recorded;⁴ and where the law does not require a record to be kept it has been held that a copy of such a record is inadmissible in evidence.⁵ In Kansas it was held that where a city furnished no book for recording its ordinances, and the registrar kept proceedings of the city council on slips of paper and gave third parties what purported to be an ordinance of

¹ *Commonwealth v. Heffron*, 102 Mass. 148. See, also, *Safe Deposit Co. v. Association* (1891), 126 N. Y. 450.

² *Greeley v. Hamman* (Colo., 1891), 28 Pac. Rep. 460; *Ottumwa v. Schaub*, 51 Iowa, 515; *Wapella v. Davis* (1890), 39 Ill. App. 592; *Delphi v. Lowery* (1891), 74 Ind. 520. *Cf.* *Tuscaloosa v. Wright*, 2 Port. (Ala.) 230. Books of corporation *not* evidence in its favor.

³ 1 *Greenleaf on Evidence* (15th ed.), §§ 91, 484; *Commonwealth v. Chase*, 6 Cush. 248. The court said in this case: — "The clerk of a city or town is the proper certifying officer of all votes, ordinances or by-laws of said city or town, and copies thereof duly attested by the clerk are competent evidence to go to the jury, without any special verification of the genuineness of said signature." Page 249.

Oakes v. Hill, 14 Pick. 442; *United States v. Percheman*, 7 Pet. 51; *Denning v. Roome*, 6 Wend. 651; *People v. Adams*, 9 Wend. 333; *People v. Murray*, 57 Mich. 396; *O'Mally v. McGuin*, 53 Wis. 353; *Wood v. Bank*, 9 Cowen, 194; *Turnpike Co. v. McKean*, 11 Johns. 98; *Wapella v. Davis* (1890), 39 Ill. App. 592. Ordinance in the last case provided that any number of copies thereof should be considered *original*. *Johnson v. Taylor* (1890), 68 Miss. 330. Where the municipal records were those of another State. *Walker v. Aurora* (Ill., 1892), 29 N. E. Rep. 741; *Troy v. Railroad Co.*, 11 Kan. 519.

⁴ *Haile v. Palmer*, 5 Mo. 403.

⁵ *Brown v. Hicks*, 1 Pike (Ark.), 232.

the city, under his hand and the seal of the city, attested by the mayor, *upon which the parties had acted*, that such a copy was admissible in evidence and also the slips of paper.¹

§ 1296. Proof of records — By originals.— In the absence of any provision in the act of incorporation providing for the proof of ordinances, the general common-law rules will apply.² And inasmuch as only municipal courts take judicial notice of city ordinances, in other courts they must be proven just as any other facts.³ It was held in Tennessee, in a recent decision, that when charter and statute are both silent as to the method of proof of municipal ordinances, this must be by production of the originals or the books in which they are contained.⁴ Where the law or the charter of a city requires a clerk thereof to keep a journal of the acts and proceedings of the city council, this, or a copy of the same, is the proper evidence of the official doings of that body.⁵ Where no record of an ordinance is kept, the original ordinance or a duly certified copy thereof must be produced for the purpose of proving the same.⁶ But the fact that a statute allows a municipal record to be proven by a sworn copy does not, of course, exclude the original.⁷

§ 1297. The same subject continued — By certified copies. Municipal records are duly and properly proved by a copy of the original minutes or records, certified by the clerk or other officer in whose custody they are kept.⁸ And it was held in

¹ *Troy v. Railroad Co.*, 11 Kan. 519. See, also, *State v. Van Winkle*, 25 N. J. Law, 73, and *Gearhart v. Dixon*, 1 Pa. St. 224.

² *Chicago &c. R. Co. v. Engle*, 76 Ill. 317; *City Council v. Durr*, 1 McCord (S. C.), 333; *Fitch v. Pinckard*, 5 Ill. 78.

³ *MacPherson v. Nichols* (Kan., 1892), 29 Pac. Rep. 679. See, also, *Charleston v. Phosphate Co.*, 34 S. C. 541.

⁴ *Rutherford v. Swink* (1891), 90 Tenn. 152.

⁵ *Lowell v. Wheelock*, 11 Cush. 391; *Harris v. Whitcomb*, 4 Gray,

433; *Louisville v. McKegney*, 7 Bush (Ky.), 651; *Jordan v. School District*, 38 Me. 164; *Morrison v. Lawrence*, 98 Mass. 219.

⁶ *Pugh v. Little Rock*, 35 Ark. 75; *Louisville &c. R. Co. v. Shires*, 108 Ill. 617; *Block v. Jacksonville*, 36 Ill. 301.

⁷ *Green v. Indianapolis*, 25 Ind. 490.

⁸ *People v. Minck*, 21 N. Y. 539; *Denning v. Roome*, 6 Wend. 651; *Hickok v. Shelburne*, 41 Vt. 409; *Commonwealth v. Chase*, 6 Cush. 248; *Dudley v. Grayson*, 6 T. B. Mon. (Ky.) 251; *Bryan v. Wear*, 4 Mo. 106. The handwriting of the attesting officer

Illinois that even an ordinance of a city of another State was provable by a properly sworn copy thereof without further attestation.¹ But as a rule an attestation by the proper officer is a *sine qua non* to the receivability of such a copy in evidence. Thus in Massachusetts it was held that an attestation made by the secretary of a banking corporation was insufficient to make it admissible in evidence without being sworn to, as he was not the proper certifying officer.² It has already been stated that copies of municipal records so adduced and attested are equally receivable with the originals in evidence, but with this qualification, that they are only *prima facie* evidence of the existence, contents and enactment of ordinances; upon being produced the burden of proof shifts to the opposing side to disprove them.³ And when the regularity of the enactment of an ordinance is called in question, the original journal and record of the official proceedings must be produced.⁴

§ 1298. **Parol evidence.**—The well established rule of evidence that a written instrument cannot be varied or contradicted by parol testimony is equally applicable to municipal records.⁵ It has been held that when the record of a city's

proves itself. Best's Principles of Evidence (Chamb. ed.), pp. 454, 455, 456, and cases there cited.

¹Louisville &c. Ry. Co. v. Shires (1884), 108 Ill. 617. See, also, Johnson v. Taylor (1890), 68 Miss. 330.

²Bank v. Hamlin, 14 Mass. 178. See, also, Ottumwa v. Schaub, 52 Iowa, 515.

³Lumber Co. v. Arkadelphia (Ark., 1892), 19 S. W. Rep. 1053; Terre Haute &c. R. Co. v. Voelker, 31 Ill. App. 314; Holly v. Bennett, 46 Minn. 386; Barr v. Auburn, 89 Ill. 361; Lindsay v. Chicago, 115 Ill. 120; Prell v. McDonald, 7 Kan. 446; Independence v. Trouville, 15 Kan. 70; State v. King, 37 Iowa, 462; Commonwealth v. Chase, 6 Cush. 248. See language of Dewey, J., p. 249. See, also, as to method of "pleading" an

ordinance, Charleston v. Phosphate Co. (1891), 34 S. C. 541.

⁴Barnes v. Common Council (1888), 89 Ala. 602.

⁵Manning v. Parish, 6 Pick. 16; Wild v. Deig, 43 Ind. 455; Hoag v. Durfy, 1 Aik. (Vt.) 286; Ball v. Fagg, 67 Mo. 481. Parol testimony inadmissible to contradict date of ordinance and approval by mayor attested by clerk. Galbraith v. Littleich, 73 Ill. 209; Pittsburg v. Cluley, 74 Pa. St. 262; Aurora v. Fox, 78 Ind. 1; Stevens v. Society, 12 Vt. 688; Lovett v. Eastman, 77 Me. 117; Logansport v. Crockett (1878), 64 Ind. 319; Cabot v. Britt, 36 Vt. 349; Halleck v. Boylston, 117 Mass. 469. Record is evidence. Lexington v. Headly, 5 Bush (Ky.), 508; Covington v. Ludlow, 1 Metc. (Ky.) 295. When a city

proceedings fails to show certain facts which it ought to show, and which should properly be of record, parol testimony cannot be resorted to to establish the same.¹ The court said, in a case decided in Indiana:—“Acts of corporate bodies are sometimes omitted to be of record; generally, in such cases, if there is no prohibition in the charter, they may be proved by parol.”² And that law seems the best to the author, applying the ordinary rules of evidence with reference to “latent ambiguities,” under which head omissions might be considered as falling, which makes parol evidence admissible in all cases to show such omissions (unless expressly prohibited by statute, charter or ordinance itself), as contradistinguished from its inadmissibility for the purpose of variation or contradiction.³ Thus, for example, it was very recently decided in Michigan that it was competent to prove by parol in aid of the record that an annual meeting was adjourned to the time of the subsequent meeting, when minutes in the record book of a school district, purporting to be of its annual meeting, were not signed by any one, and did not show any adjournment, but the minutes of a subsequent meeting, written upon the fly-leaf of the same book, and signed by the director, showed that the latter meeting was held in pursuance of an adjournment.⁴

§ 1299. The same subject continued.—It clearly follows from what has already been said with reference to the evidential character of official records, and from the fact that when properly attested even a copy thereof imports absolute verity, that wherever there has been any record kept, either

council acts as a court parol testimony is inadmissible to prove its proceedings; its record must be produced. *Pearsons v. University*, 44 Ga. 529.

¹ *Tyler v. Henry*, 2 Pick. 397; *Baker v. Scofield*, 58 Ga. 182. See, also, *Dillon on Munic. Corp.* (4th ed.), § 299.

² *Indianapolis v. Imberry*, 17 Ind. 175, 179. See, also, *Darlington v. Commonwealth*, 41 Pa. St. 68.

³ *Ross v. Madison*, 1 Ind. 281; *School District v. Atherton*, 12 Met. 105;

Langsdale v. Bonton, 12 Ind. 467; *Bigelow v. Perth Amboy*, 25 N. J. Law, 297; *Gearhart v. Dixon*, 1 Pa. St. 224; *Bridgford v. Tuscumbia*, 4 Woods, 611. See, also, *Delphi v. Evans*, 36 Ill. 90, which decides that when a charter requires acts to be recorded, then such acts cannot be proved by parol unless they have been lost after having been recorded.

⁴ *School District v. Clark* (Mich., 1892), 51 N. W. Rep. 529.

as matter of fact or in pursuance of some requirement of the law, parol testimony cannot be introduced to show their existence.¹ But on the other hand it was held in Louisiana in a recent decision, that while official journals of a legislature required to be kept by the constitution import absolute verity, and parol and extrinsic proof is inadmissible to contradict facts recited in them, still such proof is admissible to show that they are not the genuine records.² So records that have been destroyed by fire, or that are of an ancient character and cannot be found, or that have been lost, are provable by parol or extrinsic testimony.³

§ 1300. Amendments.—A very interesting and instructive case, decided in the Supreme Court of Errors of Connecticut, held that the strict and technical rules applicable to the correction of judicial records should not be enforced touching amendments made in the records of municipal proceedings, and that where no serious detriment would ensue to any one interested, a clerk has power to amend the records of a town six months after the occurrence of a matter therein appearing, and that not upon his own knowledge of the facts, but upon information derived from third persons. But in his dissenting opinion, filed in this case, which opinion, it is submitted, is the correct and only tenable view of the question, the chief justice said:—"I am persuaded that a material alteration cannot be made in any record by the mere *ex parte* act of the clerk, unless made under the sanction . . . of his official oath, an oath which, if I mistake not, requires him to make a true record, not of what he has heard and therefore believes, but of what he knows officially."⁴ And, generally

¹Stewart v. Clinton, 79 Mo. 603; *Ex parte* Calhoun (1891), 87 Ga. 359. Lumbard v. Aldrich, 8 N. H. 31; In this case extrinsic testimony was Haven v. Asylum, 13 N. H. 532; disallowed to prove public records Delphi v. Evans, 36 Ill. 90. lost or destroyed, but it is noticeable

²Morris v. Mason (1891), 43 La. Ann. 590. See, also, Dyer v. Boogan, 70 Cal. 136; Commissioners v. Fairfield, 90 Cal. 186. that the pleadings did not set out anything at all as the specific contents of such records to be proven. Upon this side issue the case probably

³Sargent v. Newman (1891), 43 La. Ann. 873; Dodge v. Gallatin, 130 N. Y. 117; s. c., 29 N. E. Rep. 107; ⁴Turnpike Co. v. Pomfret, 20 Conn. 590, 602. See, also, Samis v.

speaking, when a clerk has personal knowledge of an error, and honestly desires to make a record conform to the truth, he may, by virtue of his office, amend the same for that purpose.¹ But when such amended records are introduced in evidence the truth of the facts alleged must be clearly proven.²

§ 1301. **The same subject continued.**—In Missouri it was held that while amendments in the records of the proceedings of a town must be made by those who were in office when the proceedings were had, still it is not essential to the validity of such that they be in office at the time of making the amendment.³ In Massachusetts, on the other hand, one who was formerly a town clerk cannot, after he has ceased to be such, amend a record made by him while he was clerk.⁴ Where a clerk has failed properly to record the proceedings of a city council, the same council, at a subsequent meeting, may cause a *nunc pro tunc* entry of their proceedings to be made, but a different council cannot do this.⁵ But amended town records will not bind the inhabitants of a town.⁶ And municipal records cannot be varied so as to interfere with rights thereby acquired.⁷

King, 40 Conn. 298; *Farren v. King*, 41 Conn. 448; *Logansport v. Crockett*, 64 Ind. 319. An examination of this case of *Turnpike Co. v. Pomfret*, *supra*, will show, it is believed, that the vital difference between the decision and dissenting opinion lies in the fact that the amendment was made, not upon the clerk's own knowledge, but upon information derived outside. All the judges agreed that amendments made by a clerk were proper.

¹ *Welles v. Battelle*, 11 Mass. 477; *Mott v. Reynolds*, 27 Vt. 206; *Gibson v. Bailey*, 9 N. H. 168; *Lowe v. Pettengill*, 12 N. H. 337; *Bishop v. Cone*, 3 N. H. 515; *Cardigan v. Page*, 6 N. H. 182; *Hoag v. Durfey*, 1 Aik. (Vt.) 286; *Samis v. King*, 40 Conn. 298. An honest correction of town rec-

ords does not vitiate by-laws. *St. Charles v. O'Malley*, 18 Ill. 408.

² *Pierce v. Richardson*, 37 N. H. 306; *Cass v. Bellows*, 31 N. H. 501; *Lowe v. Pettengill*, 12 N. H. 337; *Turnpike Co. v. Pomfret*, 20 Conn. 589; *New Haven &c. R. Co. v. Chatham*, 42 Conn. 465.

³ *Kiley v. Cramer* (1873), 51 Mo. 541; *Stadler v. Roth*, 59 Mo. 400. See, also, *Gibson v. Bailey*, 9 N. H. 168.

⁴ *Hartwell v. Littleton*, 13 Pick. 229; *School District v. Atherton*, 12 Metc. 105.

⁵ *Logansport v. Crockett*, 64 Ind. 319; *Covington v. Ludlow*, 1 Metc. (Ky.) 295; *Bathurst v. Course*, 3 La. Ann. 260.

⁶ *Chamberlain v. Dover*, 13 Me. 466.

⁷ *New Haven &c. R. Co. v. Chatham*, 42 Conn. 465.

§ 1302. **Right of abstract makers to take transcripts of public records.**—Upon the question whether a person engaged in the abstract-title business has the right to inspect the records and make abstracts of title to be used by him in his own business and for his own profit the decisions are conflicting. It is not a common-law right, and if it exists must be founded upon statutory law.¹ Where the statute provided that the officers having the custody of records should furnish proper and reasonable facilities for their inspection, for the purpose of making transcripts therefrom, to all persons having occasion to make an examination of them for any lawful purpose, provided, however, that such person should not use pen and ink in making the transcripts, it was held that one engaged in the abstract-title business was a person within the meaning of the statute.² And a like construction was placed upon a statute requiring a clerk to “open to the examination of any person all books,” etc., “required to be kept in his office, and permit any person so examining to take notes and copies of such books, records or papers.”³ A provision that all deeds, etc., should be recorded in books to be furnished by the clerk, “to which books every person shall have access at proper seasons, and may search the same, paying the fees allowed by law,” was interpreted to permit an attorney to examine the records free of charge.⁴

§ 1303. **The same subject continued.**—On the other hand, under a statute which provided that “all books kept by any public officer shall be subject to the inspection of all the citizens,” and prescribed a table of fees for inspection and abstracts, no person was entitled to examine or inspect the records except in the clerk’s presence and under his observation.⁵ And where “all books and papers required to be kept by the

¹ *Belt v. Abstract Co.* (1890), 73 Md. 289; s. c., 34 Am. & Eng. Corp. Cas. 440.

² *Burton v. Tuite*, 78 Mich. 363, overruling *Webber v. Townley*, 43 Mich. 534.

³ *Hanson v. Eichstaedt*, 69 Wis. 538; s. c., 20 Am. & Eng. Corp. Cas. 137.

⁴ *Lum v. McCarty*, 39 N. J. Law, 287, overruling *Flemming v. Clark*, 30 N. J. Law, 280. The court makes a distinction between searches and transcripts, holding that for the latter the clerk is entitled to compensation.

⁵ *Buck v. Collins*, 51 Ga. 391.

county officers shall be open to the inspection and examination of any person," the right of inspection can be exercised only by persons who have an interest in the record or by some one for them, and not by those who desire abstracts for private business and profit.¹ So, also, the Court of Appeals of Maryland decided in a recent case that an abstract company chartered by the legislature had no right to make copies of the public records, and that they must be obtained through the clerk and upon the payment of the fees prescribed by law.²

§ 1304. Remedial rights.—While it was held by the Supreme Court of Maine that as between a school district and a stranger who had illegally usurped the office of clerk and had possession of the records replevin could be brought therefor, upon the theory that the possession of records by a clerk was the possession of the district,³ it was decided in Michigan that replevin is not a proper remedy to obtain possession of State papers filed in a public office; that the custody of such papers belongs to the officer in charge; and further that it would violate public policy to allow a sheriff or constable under color of legal process to intermeddle with public files. *Mandamus* was declared to be the only safe method of compelling a delivery of such records by the custodian thereof;⁴ and this adjudication appears to the writer more in consonance with sound legal principles. *Mandamus* is also the appropriate remedy for a duly elected officer to compel delivery to him by his predecessor of books belonging to the of-

¹ *Cormack v. Wolcott*, 37 Kan. 391; s. c., 17 Am. & Eng. Corp. Cas. 309. In *Brewer v. Watson*, 71 Ala. 299, and *Bean v. People*, 7 Colo. 200, the same construction was given to statutes of like import.

² *Belt v. Abstract Co.* (1890), 73 Md. 289; s. c., 34 Am. & Eng. Corp. Cas. 440, where it was provided by statute that the clerks of the courts should have the custody of the books and papers, etc., which they were required to keep, preserve and deliver to their successors in office in good order, and should give a copy of any paper or

record to the person applying for it upon receipt of the usual fee.

³ *School District v. Lord*, 44 Me. 374. See, also, *Sudbury v. Stearns*, 21 Pick. (Mass.) 148. The court said in this case, which was one of trover for the possession of converted parish records, "that *mandamus* would doubtless be a more appropriate and effectual remedy to compel delivery of records to the legal officer," citing *Commonwealth v. Ahearn*, 3 Mass. 285; *Carr v. McCampbell*, 61 Ind. 97.

⁴ *People v. Treasurer*, 24 Mich. 468.

fice.¹ And where a statute declares that certain official books shall be open to inspection by any who has the need or rightful occasion so to do, *mandamus* is the proper remedy to compel the custodian to allow such inspection.² But *mandamus* will not lie to compel an inspection of documents in the hands of a corporate officer on behalf of a private citizen merely out of curiosity and when there is no necessity for such inspection.³ A *mandamus* may also issue to compel a clerk to amend records of proceedings of a common council which the charter requires him to keep.⁴

¹ Church v. Stack, 7 Cush. 226; Kimball v. Lamprey, 19 N. H. 215; Taylor v. Henry, 2 Pick. 397; Parish v. Stearns, 21 Pick. 148; Bates v. Plymouth, 14 Gray, 163; Perkins v. Weston, 3 Cush. 549. ² Recorder v. Brooks (Colo., 1892), 29 Pac. Rep. 746. ³ People v. Walker, 9 Mich. 328; People v. Cornell, 35 How. Pr. 81. ⁴ Samis v. King, 40 Conn. 298.

CHAPTER XXXII.

FIREMEN AND POLICEMEN.

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| <p>§ 1305. Organization of fire department.</p> <p>1306. Liability of corporation for removal of fireman.</p> <p>1307. <i>Certiorari</i> to review dismissal of fireman.</p> <p>1308. Policemen unknown to the common law.</p> <p>1309. Qualification of officers — Non-partisan boards.</p> <p>1310. Police fund — Legislative control of.</p> <p>1311. Suspension pending trial on charges of misconduct.</p> <p>1312. The tribunal to hear charges.</p> <p>1313. The hearing.</p> | <p>§ 1314. Counsel and witnesses.</p> <p>1315. Examining the accused as a witness.</p> <p>1316. Neglect and absence from duty.</p> <p>1317. Violating regulations.</p> <p>1318. Evidence of intoxication.</p> <p>1319. Conduct unbecoming an officer.</p> <p>1320. The same subject continued.</p> <p>1321. Severity of punishment.</p> <p>1322. Review of proceedings by <i>certiorari</i>.</p> <p>1323. Recovery of salary after restoration upon <i>certiorari</i>.</p> <p>1324. City marshals.</p> |
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§ 1305. Organization of fire department.— The organization of fire departments for municipalities large enough to make such a force an imperative necessity is usually provided for by general or special laws or by the municipal charter. In Boston, for instance, it is organized by the city council under a special act. It consists of three commissioners appointed by the mayor and aldermen, who are authorized to appoint and fix the compensation of all officers and members of the department and make suitable rules and regulations for their government and discipline.¹

¹See Johns Hopkins University Studies, vol. 5 (1887), p. 120. In New York city the mayor appoints by and with the consent of the aldermen. Consolidation Act, § 106. By the present charter of St. Louis the fire department is under the control and supervision of a "chief of the fire department" appointed by the mayor. Johns Hopkins University Studies, vol. 5 (1887), p. 166. It was held in an elaborate opinion by the Supreme Court of Indiana that an act creating a board of metropolitan police and fire department in cities having a certain population, providing for the election of the first commissioners by the legislature, and giving them exclusive control of the police and fire departments, was void as invad-

§ 1306. Liability of corporation for removal of fireman.—

The appointment and control of the fire department of Baltimore was by city ordinance vested in commissioners, and all firemen when appointed were by express provision entitled to retain their respective positions for such time as they evinced willingness and capacity to discharge their duties, and were not subject to removal on account of any religious, political or other sentiments entertained by them so long as those opinions did not interfere with the faithful discharge of their duty. The plaintiff was discharged on the ground of unwillingness and incapacity and sued for salary accruing subsequent to his discharge, alleging in his pleadings that the decision of the commissioners was not an honest exercise of judgment and discretion, but a contrivance to effect his removal on account of his political opinions, etc. But the court held that the commissioners were the sole judges of the plaintiff's efficiency and their determination was conclusive upon all other tribunals.¹

§ 1307. *Certiorari* to review dismissal of fireman.—In reviewing by *certiorari* the dismissal of an engineer of a fire department for negligence, the Supreme Court will not weigh the evidence; but if a legitimate inference that the officer was negligent can be deduced from the testimony, the finding of the board of fire commissioners will be affirmed.² Relator, a fireman, was charged with absence from duty without leave,

ing the province of local self-government. "The conclusion we unhesitatingly reach is that the right of self-government in towns and cities of this State is vested in the people of the respective municipalities, and that the General Assembly has no right to appoint the officers to manage and administer municipal affairs; that the right of the General Assembly ends with the enactment of laws prescribing the manner of selection and the duties of the officers." *State v. Denny*, 118 Ind. 449, 469. See, also, *State v. Blend*, 121 Ind. 514; *City of Evansville v. Blend*, 118 Ind. 426; *People v. Albertson*, 55 N. Y. 50;

People v. Detroit, 28 Mich. 228; *People v. Hurlbut*, 24 Mich. 44; *People v. McKinney*, 52 N. Y. 374; *People v. Bull*, 46 N. Y. 57; *People v. Shepherd*, 36 N. Y. 285. *Cf. Mayor v. Board of Police*, 15 Md. 376; *People v. Draper*, 15 N. Y. 532 (distinguished in *People v. Albertson*, 55 N. Y. 50); *Hudson & Co. v. Seymour*, 35 N. J. Law, 47; 1 *Dillon on Munic. Corp.* (4th ed.), § 60; *Farrell v. Bridgeport*, 45 Conn. 191; *Burch v. Hardwicke*, 30 Gratt. 24.

¹ *Mayor & Co. v. O'Neil*, 63 Md. 336. See, also, *Riley v. Kansas City*, 31 Mo. App. 439.

² *State v. City of Jersey City* (N. J. Sup.), 23 Atl. Rep. 666.

and notice to appear for trial before the commissioner was served on him personally. The charges specified minutely relator's breach of duty, and were supported by the testimony of relator's superior. It was held, the facts being presumably within the knowledge of the superior, and being unexplained by cross-examination, that the commissioner's judgment of removal should be affirmed.¹

§ 1308. Policemen unknown to the common law.—The modern policeman is a creature of statute.² The ancient conservator of the peace was the watch and constable, much after the Dogberry pattern, and all citizens were bound to take their turn in keeping watch. The provisions of the law or charter relating to the police departments, especially of large cities, are generally very comprehensive. Sometimes the mayor is the responsible head, and in other instances the department is managed by a board of police appointed by the

¹ *People v. Ennis* (Sup.), 19 N. Y. Supl. 946. Where a fireman, who has been dismissed on a charge of disrespect to one of the fire commissioners, sues the commissioners, alleging that his dismissal was in wilful violation of their duties, under an ordinance allowing the dismissal of employees for inefficiency, or failure to perform their duties to the satisfaction of the commissioners, but not for any political or other sentiments entertained by them, evidence as to plaintiff's conduct on previous occasions, or as to his efficiency and general reputation, has no bearing on the question of his guilt or innocence on the occasion mentioned in the charge, nor upon the fairness of the commissioners' judgment, and is irrelevant. *O'Neill v. Register* (Md.), 23 Atl. Rep. 960. Where the charter requires the cause of removal or suspension by a mayor to be stated in the order, a communication by the mayor to the council merely appointing a person in the place of an incumbent does not

constitute a removal. *Selby v. Portland*, 14 Oregon, 243; s. c., 12 Pac. Rep. 377. One who, in the municipal resolution appointing him, is called a detailed fireman, is none the less a fireman who can be removed only in the mode prescribed by the city charter. *People v. Brooklyn Fire Dep't Comm'rs*, 103 N. Y. 370.

² *Commonwealth v. Dugan*, 12 Met. 233; *Doering v. State*, 49 Ind. 56; *Buttrick v. Lowell*, 1 Allen, 172; *Commonwealth v. Hastings*, 9 Met. 259; *Mitchell v. Rockland*, 52 Me. 118. The State has the right to prescribe the manner of selecting the constabulary, including the police force of a city. *People v. Draper*, 15 N. Y. 532; *People v. Shepard*, 36 N. Y. 285; *People v. Mahaney*, 13 Mich. 481; *State v. Covington*, 29 Ohio St. 102; *Police Comm'rs v. City of Louisville*, 3 Bush, 597; *State v. Hunter*, 38 Kan. 578; *Mayor &c. v. State*, 15 Md. 376; *State v. Seavey*, 22 Neb. 454. See, also, *Commonwealth v. Plaisted*, 148 Mass. 375.

governor of the State, with power to establish and organize the police and prescribe regulations.¹

§ 1309. Qualification of officers — Non-partisan boards.— A Massachusetts statute creating a board of police for the city of Boston, to be appointed by the governor and council from "the two principal political parties," was held to violate no constitutional provision. "The legislature has the right," said the court, "to fix the qualifications of the members of the board, and we see no objection to the provision that they shall be appointed from the two principal political parties. It is designed to secure, in the action of the board, impartiality and freedom from political bias."² But in Indiana such a political test of eligibility to an *elective* office, thus disqualifying a large number of citizens who belong to no particular party, was held to contravene the constitutional provision prohibiting the granting of special privileges and immunities.³

§ 1310. Police fund — Legislative control of.— A California statute fixed the compensation of police officers of the city and county of San Francisco at a certain sum per month, and directed the treasurer of the city and county to "retain from the pay of each police officer the sum of \$2 per month to be paid into a fund to be known as the 'Police Life and Health Insurance Fund,'" of which \$1,000 was to be paid to the personal representative of any member of the police force upon his death. It was held that as the police officer never

¹See Johns Hopkins University Studies, vol. 5 (1887), Index, tit. "Police." In *City of Evansville v. State*, 118 Ind. 426, it was held that the legislature could not constitutionally appoint a board of police commissioners with exclusive power over the police department of a city. See, also, *State v. Denny*, 118 Ind. 449. It was held in *State v. Sims*, 16 S. C. 486, that under charter authority to make all such rules and regulations as may be necessary to good order and public peace the power to appoint policemen is implied.

²*Commonwealth v. Plaisted*, 148

Mass. 375. "It can probably be regarded only as directory to the governor," continued the court, "and not as an element in the tenure of the office; in either view, it violates no provision of the constitution, and it is for the legislature to determine whether such a qualification is wise." See, also, to the same effect, *State v. Seavy* (Neb.), 35 N. W. Rep. 228; *State v. Bennett* (Neb.), 35 N. W. Rep. 235.

³*City of Evansville v. Blend*, 118 Ind. 426; *State v. Denny*, 118 Ind. 449; *State v. Blend*, 121 Ind. 514.

received the amount so retained, nor had any power of disposition over the same, he had no property rights in such fund, which was in effect created by the State, until the happening of the contingency upon which the statute provided that part of it should be paid to him or his representative, and until that time the fund was entirely at the disposal of the State.¹

§ 1311. Suspension pending trial on charges of misconduct.—A board of police commissioners was authorized by law to suspend any member of the police force after trial and due hearing and upon proper cause and charges and not otherwise. Charges of disrespect and misconduct towards certain members of the board were preferred against the chief of police. The board sat with closed doors and in secret session, and passed resolutions providing for the taking of an appeal to the court of last resort from the decision of an inferior tribunal relating to the nature and limitation of their jurisdiction over the chief of police, and postponed the hearing of the charges until after a determination should be had in the appellate court. They also resolved that in the meanwhile the defendant be wholly suspended from office. Upon the

¹ *Pennie v. Reis*, 132 U. S. 464. Laws of New York of 1885, chapter 364, section 2, amending Consolidation Act, § 307, provides that any member of the police force of New York city who shall have served twenty years or more, on his own application in writing, shall, by resolution adopted by a majority vote of the full board, be relieved and placed on the roll of the police pension fund, etc. It was held that the mere filing of such application by a member of the force did not dissolve his connection with it, but that until the resolution was adopted the applicant remained a policeman, subject to dismissal by the board for improper conduct. *People v. French*, 108 N. Y. 105; s. c., 15 N. E. Rep. 188. Under Laws of 1885, chapter 364, section 307, amending the Consolidation Act (Acts 1882,

chapter 410), providing that a person who has served twenty years on the police force of the city, or under the former metropolitan police, may be retired on half salary, it is not necessary that the service should have been continuous, but if it aggregates twenty years it is sufficient. The board of police may, in their discretion, retire an officer under the statute mentioned, but they are not bound to do so. *People v. French*, 46 Hun, 232. *Mundamus* will not lie to compel the board of police commissioners of the city of New York to place the widow of a deceased police officer on the police pension roll; Laws of 1887 providing that the board "shall have power in its discretion" to grant such pensions. *People v. Martin* (N. Y. App.), 30 N. E. Rep. 60.

defendant's application for a writ of prohibition the action of the board was sustained. The court said:—"The suspension of an officer pending his trial for misconduct so as to tie his hands for the time being seems to be universally accepted as a fair, salutary and often necessary incident of the situation. The retention at such a time, with all the advantages and opportunities afforded by official position, may enable and encourage him not only to proceed in the rebellious practices complained of, but also to seriously embarrass his triers in their approaches to the ends of justice. In the absence of express limitation to the contrary, we are of opinion that in cases where guiltiness of the offense charged will involve a dismissal from office, there is, on general principles, no arbitrary and improper exercise of a supervisory authority in a suspension of the accused pending his trial in due and proper form."¹

§ 1312. The tribunal to hear charges.—It is frequently provided by municipal charters or general laws of the State applicable to municipal corporations that policemen shall not be removed except for cause and after a hearing by some appropriate municipal officer or board.² Where, as in New Jersey, the language of the statute is, after a hearing "by the appropriate municipal board," and the charter of a city vests the power of removal in the city council, the council cannot authorize a police board created by ordinance to hear charges

¹State v. Police Comm'rs, 16 Mo. App. 48, 50. The objection that the suspension was for an unreasonable time, inasmuch as the decision of the appellate court was not likely to be rendered during the term of the defendant's office, was overcome by the presumption of official fidelity to duty, etc.; but the court intimated that if it should subsequently appear that the delay was practically unjust and oppressive, there would be occasion to apply appropriate compulsory methods to hasten the proceedings of the commissioners. See, also, Mayor &c. v. Fahm, 60 Ga. 109.

²Mass. Acts, 1890, ch. 319, providing for removal by the mayor for cause deemed by him sufficient, after due hearing; N. Y. Laws of 1887, ch. 192, as to policemen of the New York and Brooklyn bridge; N. J. Act of March 25, 1885, § 5; Me. Acts of 1877, ch. 346, as amended by Acts of 1878, ch. 16; N. Y. Laws of 1870, ch. 77, as amended by Laws of 1873, ch. 495, as to the police of Albany, that no one shall be dismissed without written charges and due notice and trial.

against policemen nor to suspend them for cause.¹ In Maine under a statute providing that the city marshal should be subject "after hearing to removal at any time by the mayor by and with the consent of the aldermen for inefficiency or other cause," it was held that the hearing must be by the mayor and aldermen and not by the aldermen alone.² Under the New York statute providing that policemen of the New York and Brooklyn bridge are removable only after written charges preferred, and a public examination thereon, in such manner as the rules and regulations of the trustees may prescribe, but no removal can be had after such hearing unless by a majority vote of all the trustees, a rule that the hearing shall be had before the president of the board, who, in case he recommends the dismissal of the person charged with the offense, shall report the evidence to the board, is valid.³

§ 1313. The hearing.—While under the statutes noticed in the preceding section the officer is entitled to a fair hearing and investigation, he cannot insist on all the formalities necessary in criminal trials.⁴ Thus it has been held that an investigation by the police commissioners of New York city

¹ Carey v. Board of Police &c. (N. J., 1891), 21 Atl. Rep. 492.

² Andrews v. King (1885), 77 Me. 224. Under Massachusetts Acts 1890, chapter 319, which provides that members of the police force shall "hold office during good behavior, and until removed by the mayor for cause deemed by him sufficient, after due hearing," the mayor has power to hear all cases on the removal of police officers in the first instance, though the police regulations provide that the investigation of all charges shall be before the committee on police, and the evidence shall, with the report of the committee, be submitted to the mayor. McAuliffe v. City of New Bedford (Mass.), 29 N. E. Rep. 517. It was also held in the same case (*mandamus* to reinstate a discharged policeman) that statements by the mayor that he did not

care about the evidence, and that he knew what the petitioner had been doing, were immaterial, where the judge found that there had been a due hearing.

³ People v. Board of Trustees, 7 N. Y. Supl. 806.

⁴ State v. Board of Police Comm'rs, 46 N. J. Law, 170; s. c., 6 Atl. Rep. 659. The mayor's refusal to grant specifications on final hearing in proceedings to remove a policeman was not error, where the complaint was tolerably full, and there was evidence that at the first hearing the policeman said:—"I admit I am guilty. What's the penalty?" and at another interview said if he was going to be removed he would like to know it, so that he could resign, McAuliffe v. City of New Bedford (Mass.), 29 N. E. Rep. 517.

into charges of neglect of duty on the part of a patrolman need not be governed by the rules governing trials in courts of law. The evidence may be taken before one commissioner and then submitted to the others, even though the commissioner before whom it was taken ceases to be a member of the board at the time it was acted on.¹ But the fact that the mayor and aldermen might have removed a policeman without trial does not warrant irregularities in a hearing granted or in the order of removal.²

§ 1314. Counsel and witnesses.—The right to be heard carries with it the right to summon and examine witnesses³ and to employ counsel.⁴ It is not an improper denial of the

¹ *People v. New York Police Comm'rs*, 98 N. Y. 332.

² *Asbell v. Mayor &c. of Brunswick*, 80 Ga. 503, an application for *certiorari*, where it appeared that petitioner was tried before six aldermen for certain offenses as a policeman, and a vote on his dismissal from the force was evenly divided, the chairman voting, and afterwards the vote of the chairman was ignored as illegal, thus condemning the petitioner, it was decided that the writ should be granted, though the city charter expressly authorized the mayor and aldermen to remove such officer for good and sufficient cause, without trying him, there being nothing in the charter, or, as far as appeared, in the ordinances, depriving the presiding officer of the right to vote. In the summary proceedings of the board of police commissioners dismissing from service a patrolman it must appear that they found him guilty, but no formal record of conviction need be kept. In such a case a blank used by the board, on which the name of the accused, his plea, the finding of the board and the sentence were entered, and the paper then handed to the clerk for filing, is a sufficient record to support the con-

viction. *State v. City of Jersey City* (N. J.), 22 Atl. Rep. 123.

³ *People v. French* (1889), 51 Hun, 427; s. c., 3 N. Y. Supl. 841.

⁴ *People v. Board of Police Comm'rs* (1891), 11 N. Y. Supl. 841, following *People v. Hannan*, 10 N. Y. Supl. 71; s. c., 56 Hun, 469. In the latter case it appeared that the charter of the city of Troy provides that no member of the police force shall be removed "without having written charges preferred against him and the same having been publicly heard and examined, after due notice thereof and upon due proof." A rule of the board of police commissioners of the city provides that no officer shall be removed except upon substantiation of the written charges preferred against him after a fair trial, in which full opportunity shall be given him for his own defense as prescribed by law. Another rule provides that "no counsel are needed for the investigation of any charges but may be allowed." Constitution of New York, article 1, section 6, provides that in any trial in any court whatever, the accused shall be allowed to appear and defend in person and with counsel. It was held that the police commissioners could not

defendant's right to examine witnesses where he merely inquires if he shall call certain witnesses, and is told by the commissioners, on stating what he expects to prove by them, that they will do him no good, the witnesses not being present.¹ And the proceedings of the police commissioners in dismissing a policeman were not reversed because the accused was not allowed to show that the other person was drunk and that he was trying to arrest him; when the evidence of others proved that it was a mere quarrel.² But an order of dismissal was reversed where a witness called in defendant's behalf was rejected before he had given any testimony, merely on a showing that he had been discharged from the postoffice department because of absence from duty without leave, which was due to intoxication.³

§ 1315. Examining the accused as a witness.— In a trial before police commissioners of a policeman for neglect of duty, the commissioners may question the accused about the circumstances of the case before the testimony of the prosecution is received,⁴ and if the defendant made no objection to being sworn and examined he cannot subsequently have the decision reversed on the ground of being compelled to testify against himself.⁵ An objection by the accused that the commissioners ought to make out a case against him before he should be compelled to testify is directed to the order of the examination, and does not raise the question that the accused is compelled to criminate himself, in violation of the constitution.⁶

deprive a policeman of the right to appear and defend with counsel on his trial for official misconduct.

¹ *People v. French*, 6 N. Y. Supl. 213.

² *People v. Martin*, 8 N. Y. Supl. 516.

³ *People v. French*, 51 Hun, 427; s. c., 3 N. Y. Supl. 841.

⁴ *People v. McClave*, 123 N. Y. 512; s. c., 25 N. E. Rep. 1047; affirming s. c., 10 N. Y. Supl. 764.

⁵ *People v. French*, 8 N. Y. Supl. 456. In *People v. Robb* (1890), 9 N. Y. Supl. 831, the record stated the tes-

timony of the relator as follows:—

"John J. Quinn [relator], being duly sworn, testified as follows:— Question. Are you guilty or not guilty? Answer. I am guilty of going in the box for the simple purpose of drinking my coffee. . . . Q. But you were there, sitting down? A. No, sir; I deny sitting down." It was held that it not appear that relator was wrongfully compelled to be sworn as a witness against himself.

⁶ *People v. McClave*, 123 N. Y. 512; s. c., 25 N. E. Rep. 1047.

§ 1316. Neglect and absence from duty.—Neglect or absence from duty is a frequent ground for the dismissal of policemen. The numerous cases upon the point turn, however, mainly upon the fact and are not generally instructive. Where the evidence against a policeman charged with neglect of duty was that he was in a store apparently drunk and asleep during his tour of patrol; that being asked, on coming out, what he was doing in there, he replied, "Nothing," but afterwards said some one was sick in there, which the storekeeper contradicted; and his own testimony was that he felt a dizziness, but did not know what ailed him, and went in the store, but that he had not been drinking, the decision of the commissioners dismissing him was not disturbed.¹ A policeman went into a private residence at night and remained nearly three-quarters of an hour, and on coming out was preceded by a young man, who, after looking up and down the street, said, "All right; come." The officer testified that he went in on account of sickness, and that he made an entry of the absence in his book while there. After it was shown that there was no light in the place where he stated that he wrote the entry, he denied that he had testified that it was made in that place. It was held that a finding that he was guilty of leaving his post was warranted.² In New York it is provided by statute that any member of the police force of New York city who shall be absent from duty without leave for five days shall, at the expiration thereof, cease to be a member of the force.³ This act was held, however, not to apply in a case where a patrolman was arrested and confined under criminal process, but who reported for duty upon his release; and his absence being enforced, he was considered entitled to his wages during the time of his arrest.⁴ Again, under a rule of the department making "absence without leave" a cause of dismissal, a patrolman should not be removed who was absent from roll-call on account of serious illness.⁵ But when the rule of the department called for a certificate of sickness from the police surgeon, a policeman who made no effort to procure one was

¹ *People v. French*, 8 N. Y. Supl. 459.

² *People v. Bell*, 3 N. Y. Supl. 314.

³ N. Y. Laws of 1878, ch. 755, § 5.

⁴ *People v. Board of Police Comm'rs*, 114 N. Y. 245; s. c., 21 N. E. Rep. 421.

⁵ *People v. Board of Police*, 55 Hun, 445; s. c., 8 N. Y. Supl. 640.

considered properly dismissed.¹ The court declined to interfere with the decision of commissioners dismissing a police officer where the preponderance of testimony showed that while on duty he was found off his post, lying on the grass with two other officers, in violation of the rules of the department.² Uncontradicted evidence that a policeman failed to arrest one who committed an assault in his presence warrants a finding of neglect of duty; and the failure to make the arrest is not excused by the fact that he was not on duty at the time.³

§ 1317. Violating regulations.—It is no excuse that a policeman charged with violating one of the rules of the department merely committed a mistake of judgment.⁴ Thus one of the police regulations of the city of Brooklyn provided that, “in case of fire, burglary, riot or other emergency, the sergeant, roundsman or patrolman who discovers the same shall immediately send information to the officer in command at the station, and in the meantime take such action as the case may require.” A policeman, hearing some one screaming, went to the place, and found a woman who stated that an acquaintance of his, naming the person, had broken into her room, and that to escape an assault she had jumped from the second-story window. The policeman called two other officers, made an investigation, and concluded that no crime had been committed. He advised the woman to get out a warrant for her assailant’s arrest, but did not report the affair to the officer in charge at the station, and it was held to be a violation of the regulations.⁵ Again, proof that a policeman ordered cigars from a manufacturer, to be delivered to a number of persons in small quantities; that the cigars

¹ *People v. McClave* (1891), 13 N. Y. Supl. 340.

² *People v. Crimmins*, 1 N. Y. Supl. 656, 657.

³ *People v. Bell*, 8 N. Y. Supl. 748. Under the Laws of New York of 1887, chapter 262, which provides that the board of commissioners of public parks shall have power to remove officers from the police force

of the park department for immoral or unbecoming conduct, the board may remove an officer who, while on duty in a park, indecently and wilfully exposes his person in the presence of female visitors. *People v. Robb*, 16 N. Y. Supl. 124.

⁴ *People v. McClave* (1890), 10 N. Y. Supl. 561.

⁵ *People v. Bell*, 3 N. Y. Supl. 812.

were charged to him; and that he was in the business of canvassing for the sale of cigars,—shows *prima facie* a violation of a rule of the police department which provides that “each member of the police force shall devote his entire time and attention to the business of the department, and he is expressly prohibited from following any other calling or being engaged in any other business. Although certain hours are allotted to members of the force for the performance of duty on ordinary occasions, they must at all times be prepared to act immediately on notice that their services are required.”¹ But on a charge against a policeman for violating a rule of the department, in that he “drew his pistol on a citizen, and fired a shot, not in self-defense,” where he explained that he did not draw his pistol on or fire at or see the injured man until after firing the shot; that he fired the pistol in the air to attract other officers to assist him in watching suspicious characters, it was held that a case was not made out sufficient to justify his dismissal.² And a statute empowering the park commissioners of New York city to punish or dismiss members of the park police force on conviction of certain offenses, and to withhold the pay of any member of such force “for or on account of absence for any cause, without leave, lost or sick time, sickness or other disability, physical or mental,” does not authorize the removal of a member of such force on the ground that he is subject to insane delusions.³

§ 1318. Evidence of intoxication.—It seems to be especially difficult for policemen to rebut evidence of intoxication. In a recent case where the defendant was discharged on that ground, the sergeant in charge testified that he could not answer intelligently, and “staggered some,” and was unfit for duty. Another sergeant testified that from the appearance of the defendant, his thick speech, manner of walking and the smell from his breath, he concluded that he was drunk. The police surgeon testified that he was under the influence of

¹ *People v. Bell*, 4 N. Y. Supl. 869. *Auliffe v. City of New Bedford* (Mass.), 29 N. E. Rep. 517.

A rule prohibiting members of a police force from soliciting money for political purposes, and becoming

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members of a political committee, is open to no constitutional or statutory objection, and is reasonable. *Mc-*

² *People v. McLean*, 8 N. Y. Supl. 511.
³ *People v. Robb*, 55 Hun, 425; s. c., 8 N. Y. Supl. 502. Cf. *People v. MacLean*, 13 N. Y. Supl. 685.

liquor to the extent of requiring some few hours' sleep to work it off. The defendant declared that he had only drank a preparation for malaria. The physician who supplied the preparation testified that, properly taken, it would not produce a dazed condition, but too much would make relator a little stupid. Five witnesses, two of whom had not particularly noticed the defendant, testified that they did not consider him drunk. But the court held that his dismissal must be sustained.¹ In another late case a park policeman was charged with being off his post, and sitting down and having a can of beer in the gate box at one of the entrances to the park. His explanation that he went into the box to drink his coffee was met by the testimony of the sergeant that there was no coffee in the box, and no arrangement by which to heat coffee; and there was also testimony that upon the approach of the sergeant the defendant attempted to hide himself by getting on the floor. The court considered the testimony sufficient to sustain a finding that the charge was true.² Testimony of witnesses that in their judgment the defendant was intoxicated is unobjectionable where the opinion is limited to what the witnesses saw.³

¹ *People v. French*, 13 N. Y. Supl. 337. It appeared that the defendant, while not on duty, entered a house about 1 P. M., attempted to go up stairs, and drew a revolver, which was taken from him, and he was ejected. The proprietor of the house testified that the defendant was grossly intoxicated, and relator admitted that he did not know what house he was in, on account of the drinks he had taken because he was very chilly, having been on duty the night before, when the weather was inclement. About four hours after entering the house he could not remember what had become of his revolver, though the inspector testified that he was then apparently sober. A dismissal from the force was sustained. *People v. French* (1889), 4 N. Y. Supl. 222. See, also, *People v. French* (1889), 5 N. Y. Supl. 55.

² *People v. Robb* (1890), 9 N. Y. Supl. 831. In *People v. McClave*, 10 N. Y. Supl. 441, a dismissal for intoxication was not sustained. A physician who attended defendant at the time in question testified that he saw he had been drinking a little too much, and his breath smelt strongly of alcohol. But the defendant testified that he told the physician that he had taken brandy and oil, and the testimony of several other witnesses was to the effect that he had taken brandy and oil for cramps. And there was no evidence that he was in the habit of drinking liquor. In *People v. MacLean*, 17 N. Y. Supl. 475, an order of dismissal was also reversed.

³ *People v. MacLean* (1891), 13 N. Y. Supl. 677.

§ 1319. Conduct unbecoming an officer.—In addition to the specific acts for which policemen may be discharged the regulations of the department often provide for their removal upon conviction of conduct unbecoming an officer. This is a broad rule and covers nearly all cases not otherwise provided for. Thus where it appears that a policeman used language to a brother officer calculated to provoke an assault, and afterwards assaulted him with a club and revolver, he is guilty of “conduct unbecoming an officer” within the rule of the police department of Brooklyn, and a judgment dismissing him will not be disturbed.¹ In a late case in New York on the trial of a policeman charged with conduct unbecoming an officer in arresting a saloon-keeper for a violation of the excise laws, and agreeing with him to make the charge that of exposure for sale instead of for an actual sale, for the consideration of \$25, the saloon-keeper testified that defendant first arrested his bar-tender and then arrested the witness at his own suggestion, and discharged the bar-tender; that witness was taken to the station and discharged; that he gave defendant \$10 because it was a big favor he had done, taking witness instead of the bar-tender; and that no contract was made for the payment of the money. The arrest was made at half-past one in the morning, when it was apparent the law was being violated by having the saloon open. The officer denied receiving the money. But it was held that the action of the commissioners in discharging defendant would be affirmed.² But while this rule is broad in covering cases not otherwise provided for, it is not to be vaguely applied. There must be conviction of some specific acts manifestly unbecoming an officer, and not a general finding. Thus where one is charged with “conduct immoral and unbecoming an officer,” with a specific accusation of acts constituting a felony, the board cannot, after finding him not guilty of the acts specified, find him guilty of “conduct unbecoming an officer,” and remove him therefor.³

¹ *People v. Bell* (1889), 3 N. Y. Supl. 314. *Police of the City of Detroit* (1891), 84 Mich. 558; s. c., 47 N. W. Rep. 1099.

² *People v. McClave* (1890), 9 N. Y. Supl. 263. An officer was appointed policeman contrary to law when he was more than thirty years of age, and he had

³ *Wellman v. Board of Metropolitan* than thirty years of age, and he had

§ 1320. The same subject continued.—The commission of the crime of burglary is “conduct unbecoming an officer” which justifies a removal. It is no objection in such cases that the conduct specified constitutes an indictable offense, and the police commissioners in New York were held to possess ample jurisdiction to try the charge without waiting for a prosecution and conviction in a criminal court.¹

§ 1321. Severity of punishment.—The decision of the police commissioners, inflicting a punishment which they are authorized by law to inflict on finding an officer guilty of the charges against him, is not reviewable because of its severity, as that is in the discretion of the commissioners.² Accordingly, the dismissal of a policeman for neglect of duty, by the police commissioners, will not be interfered with on *certiorari*, though the punishment is apparently greater than the offense warrants, where the officer admits the charge against him.³ Where a policeman leaves his post and falls asleep, his dereliction gives the police commissioners jurisdiction for purposes of discipline, and the Supreme Court cannot review their action in regard to the punishment inflicted.⁴ The commissioners are the judges as to whether dismissal from the force is the proper penalty for a violation of the rules of the department.⁵ Long, faithful service and extenuating circumstances are addressed only to the discretion of the commissioners in mitiga-

been appointed after having resigned from the force without a vote by the yeas and nays, contrary to the requirements of law. It was held that these specifications had only reference to relator's title to office and not to his conduct while an officer, and did not authorize the removal. *People ex rel. Clapp v. Board of Police* (1878), 72 N. Y. 415. A policeman is entitled to counsel before a board of police commissioners on a hearing of charges preferred against him. *People v. Greenbush Police Comm'rs*, 58 Hun, 224; 126 N. Y. 223, mem.

¹ *People v. French*, 32 Hun, 112, overruling *People v. Board*, 20 Hun, 333. In *People v. French*, 60 How.

Pr. 377, it was held that a policeman was properly tried and dismissed for accepting bribes. *People v. Police Comm'rs*, 11 Hun, 408, dismissal for enticing a girl into house of assignation. *People v. Police Comm'rs*, 9 Hun, 222, for assault and battery. See, also, *People v. Police Comm'rs*, 8 W'kly Dig. 466; *People v. Police Comm'rs*, 77 N. Y. 153; *People v. Police Comm'rs*, 15 W'kly Dig. 278.

² *People v. Bell*, 8 N. Y. Supl. 748.

³ *People v. French*, 5 N. Y. Supl. 57.

⁴ *People v. French* (1889), 7 N. Y. Supl. 442.

⁵ *People v. McClave* (1890), 10 N. Y. Supl. 561.

tion of punishment, and cannot be considered by the court as ground for reversal.¹ And even punishment by dismissal from the police force for lying down while on patrol duty is not excessive, where the record of the accused officer shows numerous previous derelictions of duty.²

§ 1322. **Review of proceedings by certiorari.**—Where the police commissioners accept the voluntary resignation of a police officer, no proceedings having been instituted by them for his removal, their action cannot be inquired into on *certiorari*.³ It was held that where a policeman had been a member of the force for four years it could not be objected, on *certiorari* to review the action of the police commissioners in dismissing him for misconduct in office, that, on account of non-compliance with the civil service law, he was an officer only *de facto* and could not be restored, though the proceedings against him were irregular.⁴ In New York, where the evidence concerning the misconduct of a policeman is conflicting, and there is sufficient evidence, if credited, to establish his alleged offense, the order of the commissioners discharging him will not be reversed; as under the New York code the same rule governs the review of such a question on *certiorari* as would determine a motion to set aside the verdict of a jury as against evidence.⁵

¹ *People v. French* (1889), 6 N. Y. Supl. 213, sustaining the action of the police commissioners of New York city in dismissing a policeman for intoxication, though it appeared that he had served faithfully for eighteen years and that the liquor was taken as a medicine. *Contra*, *People v. French*, 1 N. Y. Supl. 878, where an officer was dismissed for an altercation with a brother officer in the public streets, the preponderance of proof showing that he was less to blame in the matter than the other, who was only fined thirty days' pay. He had once been commended for good conduct in making an important arrest under dangerous circumstances; and it was decided

that, as the punishment was too harsh and unequal, the decision should be reversed and the cause remanded for further action.

² *People v. MacLean* (1891), 14 N. Y. Supl. 77.

³ *People v. Martin* (1890), 10 N. Y. Supl. 511.

⁴ *People v. Hannan* (1890), 10 N. Y. Supl. 71; s. c., 56 Hun, 469.

⁵ *People v. French* (1889), 6 N. Y. Supp. 394. See, also, *People v. Hayden*, 16 N. Y. Supl. 98; *People v. French*, 7 N. Y. Supl. 460; *People v. Robb*, 5 N. Y. Supl. 869; *People v. French*, 9 N. Y. Supl. 262; *People v. Robb*, 8 N. Y. Supl. 418, 456; *People v. McClave*, 8 N. Y. Supl. 515. On *certiorari* to review the action of the

§ 1323. **Recovery of salary after restoration upon certiorari.**—It was held in New York that when a policeman had been duly appointed and entered upon the performance of his duties and he was removed by the police commissioners, and upon *certiorari* the order of removal was reversed and he was restored to his office, he could recover his salary which accrued between the time of the order of removal and the restoration, and without any abatement on account of earnings realized from his former trade resumed during the interim.¹ But where another officer is regularly inducted and occupies as an officer *de facto* the place of the officer removed, the latter cannot sustain an action for his salary until the right to the office is judicially determined by a competent tribunal in a direct proceeding for that purpose.²

§ 1324. **City marshals.**—The powers and duties of a city marshal are in relation to municipal affairs similar to those of the sheriff of the county. He is the chief executive officer

mayor and council of a city in dismissing a member of the police force, the validity of the appointment of his successor cannot be considered. But it was held in New Jersey that the legality of the relator's own appointment may be inquired into, for the act of New Jersey of March 25, 1885, section 1 (Supp. Rev., p. 514), forbidding the dismissal of members of the police force except for cause and after trial, applies only to persons lawfully in possession of the office. *State v. City of Millville* (N. J., 1891), 21 Atl. Rep. 568, 570. An officer serving under the appointment and authority of the board of police commissioners cannot, on *certiorari* to proceedings for his removal, question the constitutionality of the act constituting the board. *State v. Board of Police Comm'rs* (*Ayers v. New-ark*), 49 N. J. Law, 170. The term "officer," as used in a charter relating to removals, was held to include police officers. *City of Jacksonville v. Allen*, 25 Ill. App. 54.

¹*Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536; s. c., 7 N. E. Rep. 787, on the ground that the salary is an incident to the office and does not depend upon contract.

²*Selby v. City of Portland*, 14 Oregon, 243; s. c., 12 Pac. Rep. 377. See, also, *Dorsey v. Smyth*, 28 Cal. 21; *Douglass v. State*, 31 Ind. 429; *City of Philadelphia v. Rink* (Pa.), 2 Atl. Rep. 515; *People v. Potter*, 63 Cal. 127; *Meagher v. County of Storey*, 5 Nev. 244; *City of Philadelphia v. Given*, 60 Pa. St. 136; *Mayor &c. v. Woodward*, 12 Heisk. (Tenn.) 499; *Mayor &c. v. Hays*, 25 Ga. 590; *Dolan v. Mayor*, 68 N. Y. 274; *Bryan v. Cattell*, 15 Iowa, 438. Where a city ordinance provides that a policeman for absence without leave shall forfeit his pay except in cases of sickness properly certified by a physician, he must have produced such certificate to recover his pay. *Wilkes-Barre v. Myers*, 113 Pa. St. 395.

clothed with authority to apprehend offenders against the municipal laws.¹

¹ *Attorney-General v. Connors* (Fla., 1891), 9 So. Rep. 7. Where the mayor directed the marshal to post notices requiring the owners of dogs to keep them muzzled, and directed that all dogs found running at large without muzzles should be killed, such direc-

tion was held, in the absence of an ordinance authorizing such regulation, to give the marshal no authority to kill dogs found running at large in violation of the notice. *Stebbins v. Mayer*, 38 Kan. 573; s. c., 16 Pac. Rep. 745.

CHAPTER XXXIII.

WATER AND LIGHTS.

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| <p>§ 1325. Power of municipality as to water supply.</p> <p>1326. Contracts for water supply.</p> <p>1327. Limitations upon power to contract.</p> <p>1328. Contracts further illustrated.</p> <p>1329. The same subject continued — Monopolies.</p> <p>1330. Construction of contracts.</p> <p>1331. The same subject continued.</p> <p>1332. No exclusive right.</p> <p>1333. Rent of hydrants.</p> <p>1334. Water-works companies under New Jersey statutes.</p> <p>1335. Infringement of riparian rights.</p> <p>1336. The right to waters of a stream.</p> <p>1337. Connecting pipes.</p> | <p>§ 1338. Liability of water-works companies.</p> <p>1339. The same subject continued.</p> <p>1340. Water-rates.</p> <p>1341. The same subject continued.</p> <p>1342. Collection of water-rents.</p> <p>1343. Power of municipality to contract for lights.</p> <p>1344. The same subject continued.</p> <p>1345. Authorized contracts illustrated.</p> <p>1346. Unauthorized contracts.</p> <p>1347. Contract for gas lighting construed.</p> <p>1348. The same subject continued.</p> <p>1349. Construction of statutory and charter provisions.</p> <p>1350. The same subject continued.</p> |
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§ 1325. Power of municipality as to water supply.— Under authority to contract for a water supply for ten years, a town cannot, as a condition to its grant of authority to a company to lay pipes, require the company to furnish water for twenty years, and bind itself to take the water at a specified rate for that time.¹ A water company which has laid its pipes in the village where organized, and has made a contract to supply another town with water, has the power to lay its

¹State v. Harrison (1885), 46 N. J. Law, 79. It was intimated in the argument that since the town had power to make such a contract for ten years the resolution [for the twenty years' contract] might be upheld for that term and set aside as to the excess. But the court said the case came within the rule that although when objectionable parts of ordinances are severable from the rest they will be disregarded, when the void parts are essential and connected with the remainder of the ordinance the whole is void. Citing State v. Hoboken, 38 N. J. Law, 110; Staats v. Washington, 45 N. J. Law, 318; Siedler v. Chosen Freeholders, 39 N. J. Law, 632.

water-main through the streets of an intermediate village for the purpose of carrying on its contract, under the statute of New York, which authorizes any such corporation to lay its pipes in any street of an adjoining town or village to the town or village where it was organized, and another statute which confers that right upon such corporations contracting to supply other towns and villages with water.¹ A city permitted a corporation chartered for the purpose of supplying the city with water to construct works at great expense, under an agreement with the city that the privilege should be exclusive. It was held that the city could not permit competition, on the ground that its agreement was *ultra vires*, as tending to create a monopoly; that if it were *ultra vires* the city had exhausted its power in the premises.² While a corporation having a franchise to furnish a city with water may condemn private property, there must exist a real necessity for the condemnation. It is not enough that the acquisition of certain land would be a convenience, and would enhance the value of the property of the corporation and secure a better supply of water.³

§ 1326. Contracts for water supply.—A statute entitled “An act to enable cities to supply the inhabitants thereof with pure and wholesome water” has been held to authorize

¹ Village of Tarrytown v. Poconitico Water-works Co., 1 N. Y. Supl. 394.

² Atlantic City Water-works Co. v. Atlantic City (1885), 39 N. J. Eq. 367.

³ Spring Valley Water-works v. San Mateo Water-works (1885), 64 Cal. 123, quoting from the language of the court in Prather v. Jeffersonville R. Co., 52 Ind. 36, as follows:—“For public uses the government has the right to exercise its power of eminent domain and take private property, giving just compensation; but for public convenience it has not. A public convenience is not such a necessity as authorizes the exercise of the right of eminent domain. The taking of private property for public use is in derogation of

private right and in hostility to the ordinary control of the citizen over his estate, and statutes authorizing its condemnation are not to be extended by inference or implication.” See, also, Le Coul v. Police Jury, 20 La. Ann. 308; Jefferson v. Hazeur, 7 La. Ann. 182; Fenwick v. East London Co., L. R. 20 Eq. 544, a railway condemnation case where the master of the rolls said:—“I think the case is concluded by the authorities. I should have thought it would have been by good sense without authority, that you cannot damage your neighbor’s property merely for the purpose of saving yourself a little money where it is unnecessary for the construction of the railway.”

a city to contract for a supply of water for public and private use.¹ And a statute providing water commissioners for the city and authorizing them to contract for water with the commissioners of another city did not deprive the first of its power to contract with other bodies for the use of water under the general powers of the city.² A city passed two ordinances under which it contracted with a company organized under a general statute for the construction and operation of water-works, to pay a specified sum for water for public purposes for an indefinite period. An information was filed in the name of the attorney-general to set aside the proceedings for fraud. Before determination of that suit the ordinances were repealed. The company completed their works, but took no steps to enforce the contract for some time. When the company brought an action against the city upon the contract, prosecutor, a tax-payer in the city, applied for a *certiorari*, which was allowed. It was held that neither the city nor the tax-payer was estopped from contesting the authority of the city to take the proceedings in question, and that the writ was properly allowed if applied for within a reasonable time after it had become apparent that by the proceedings a burden might be imposed on tax-payers.³

§ 1327. Limitations upon power to contract.—A city council has no power to contract for water supply, the expense exceeding the limit of expenditure provided by law, and not provided for in the appropriation ordinance for the current year, where a statute has made it criminal for city councils to incur obligations in excess of the appropriation and limit of expenditure provided by law. And a statute conferring on cities the power to consent to the association of persons for supplying water and laying pipes in the streets would not change the matter.⁴ And a contract for water supply in-

¹Hackensack Water Co. v. City of Hoboken (1889), 51 N. J. Law, 220; s. c., 17 Atl. Rep. 307. The city was already in possession of its own water plant and only needed a supply of water, not to build, buy or acquire works or franchises for the construction.

²Hackensack Water Co. v. City of Hoboken (1889), 51 N. J. Law, 220; s. c., 17 Atl. Rep. 307.

³State v. Atlantic City (N. J., 1887), 9 Atl. Rep. 759.

⁴Atlantic City Water-works Co. v. Read, 50 N. J. Law, 665; s. c., 15 Atl. Rep. 10.

valid under that statute was not cured by other statutes which authorize cities not already supplied with water to contract for such supply for a term not exceeding ten years.¹ And where a contract for a water supply is invalid as *ultra vires*, the public are not estopped from setting up such invalidity because the contracting company has acted under the contract in constructing its works, etc., knowing the illegality of the contract, or using no diligence to ascertain whether the council exceeded its powers.²

§ 1328. **Contracts further illustrated.**—As a city of the second class in Kansas has the power to contract for water to be furnished to itself and its inhabitants, a contract for that purpose remains binding on it after it has become a city of the first class as expressly provided by the statute; and hence it has power to levy a tax to pay such contract obligation.³ In the absence of express statutory authority, a municipal corporation cannot make a permanent and exclusive contract with a water company to build water-works and supply it with water. Such authority cannot be implied from the general power conferred by its charter to contract for the needs of the municipality.⁴ An ordinance for a supply of water to a municipality for a term of years by a water company of which a majority of the councilmen were directors was held to be void where a statute of the State prohibited any member, officer or agent of any corporation from being interested in any contract for the sale or furnishing of any supplies or materials to it. And it was not ratified by payments for water made by councils none of whose members was a member of the water company.⁵

¹ *Atlantic City Water-works Co. v. Read*, 50 N. J. Law, 665; s. c., 15 Atl. Rep. 10.

² *Atlantic City Water-works Co. v. Read*, *supra*.

³ *Manley v. Emlen*, 46 Kan. 665; s. c., 27 Pac. Rep. 844.

⁴ *Greenville Water-works Co. v. City of Greenville* (Miss., 1890), 7 So. Rep. 409.

⁵ *Borough of Milford v. Milford Water Co.* (1889), 124 Pa. St. 610;

s. c., 17 Atl. Rep. 185; 23 W. N. C. 413. "It is almost needless to say," said the court, "that a contract so prohibited by law is utterly void, and there is no power that can breathe life into such a dead thing. . . . There was no ratification of the contract because there was no contract to ratify. The water company never contracted with the borough. They contracted with themselves to supply the latter with water; to that agree-

§ 1329. The same subject continued — Monopolies.— A contract between a city and a water-works company provided that if the company should fail at any time to furnish an adequate supply of water for all fire, sanitary and other public purposes, no rent should be paid by the city during the time of such failure. A subsequent paragraph provided that the company “guarantied at all times to furnish, if required; . . . a sufficient force or pressure to throw” a certain amount of water a specified distance. It was held that the company’s failure to comply with the latter requirement did not entitle the city to suspend payment of rent, but its remedy was by action for breach of guaranty.¹ A contract by which a city gives a water company the exclusive right to furnish the city with water for public purposes for twenty-five years, at a certain amount per year, is illegal, as creating a monopoly.² A water-works company had a contract for a supply of water to a Michigan village. Subsequently this village by a change of charter became a city, and subsequently under authority from the legislature established water-works of its own. It then endeavored to get rid of the old company, which was still supplying its customers, on various grounds. It was urged for one thing that when the village became a city that ended the contract. To this the court held that as

ment the borough was not a party in a legal sense. It is true the borough might, after its council had become purged of the members of the water company, have passed an ordinance similar [to the one in question] and thus have entered into a new contract. But no such ordinance was passed, and neither councils nor the officers of the municipality can contract in any other way. It is one of the safeguards of municipal corporations that they can only be bound by a contract authorized by an ordinance duly passed. The act of 1860 [prohibiting members to be interested in contracts] is another and valuable safeguard thrown around municipalities. It was passed to protect the people from the frauds of their own servants and agents. It may be

there was no actual fraud or intended in the present case, but we will not allow it to be an entering wedge to destroy the act of 1860. Of what possible use would that act be if its violations are condoned and its prohibited criminally condemned contracts allowed to be enforced under the guise of an implied ratification? It is too plain for argument that the payment by councils for some years for water actually furnished created no contract to accept and pay for it in the future.”

¹ *Wilson v. City of Charlotte*, 108 N. C. 121; s. c., 12 S. E. Rep. 846.

² *Altgelt v. City of Antonio (Tex.)*, 17 S. W. Rep. 75, following *City of Brenham v. Water Co.*, 67 Tex. 545; s. c., 4 S. W. Rep. 143.

the charter as a city made the city the successor both to rights and to obligations of the village, this in law continued the body politic as the same legal body. There was no legislation necessary to adjust the new relations of the water company and the city.¹ It was further held that a water company authorized by its charter to lay pipes and distribute water in a city had a right of access to the streets or alleys for that purpose, which right must be exercised in harmony with the public convenience; and it was the duty of the city to regulate its exercise by ordinance in such a way as to prevent injury to other interests while not interfering with the reasonable exercise of such right.²

§ 1330. Construction of contracts.—A Missouri statute provides that “any city, town or village, the plat of which has been filed in the recorder’s office of the county in which the same is situate, may, together with the territory which is or may be attached thereto, be organized in a single school district, and when so organized shall be a body politic.” It has been held that when schools formerly under control of a city are organized under this law, the property in the school buildings does not cease to be in the city, and hence a water company which contracts to furnish water free of charge for “all public buildings and offices of the city” is bound to supply the school buildings; especially so when the contract was made before the schools were so organized.³ The rule that a court in construing a doubtful provision of a contract will follow the interpretation placed upon it by the parties does not apply to contracts made by a municipal corporation in matters affecting the public interest.⁴

¹ *City of Grand Rapids v. Grand Rapids Hydraulic Co.* (1887), 66 Mich. 606; s. c., 33 N. W. Rep. 749. See, also, *St. Louis Gas Light Co. v. City of St. Louis*, 46 Mo. 121.

² *City of Grand Rapids v. Grand Rapids Hydraulic Co.*, *supra*.

³ *National Water-works Co. v. School District No. 7*, 48 Fed. Rep. 523.

⁴ *National Water-works Co. v. School District No. 7*, cited in the

preceding note. The court said:—
“It may be said that the construction given to a doubtful provision by the parties to a contract, and affecting their interest only, often influences courts in their judgment, upon the reasonable presumption that the parties to a judgment [contract?] are in a condition to best know what was meant or intended by it, and more over likely to guard their interest. The force of such reasoning is broken

§ 1331. The same subject continued.—A contract for a supply of water was made in these terms:—The payment of an agreed annual rental by the city to the water company contracted with was made dependent upon the latter supplying water for thirty years, unless the city sooner purchased the works, the water to be taken from wells and springs, sufficient to supply all the inhabitants of the city with wholesome water for domestic and fire purposes. Payment of the rental was not to begin until the completion of the works in practical compliance with the contract, nor until accepted by the common council of the city. In an action for breach of contract in failure to accept the works when the contractor had completed them, it was argued on demurrer that there was not stated a cause of action, in that the declaration had not alleged that the company had provided the supply of water contracted for, the contention of the city being that the provision in the contract as to a sufficiency of water was a condition precedent to their being obliged to accept the works. The Supreme Court of Michigan held that it was a condition subsequent to acceptance, and the covenant a continuing one, protecting the city from payment of rent in case the water was not supplied according to its terms, overruled the demurrer and ordered the case to proceed.¹

when we come to apply it to municipal corporations. They must of necessity have their affairs conducted by persons selected according to law, who often have but a general public interest in the matter intrusted to them, are frequently changed and not always the best calculated to construe contracts made by their predecessors. This is illustrated to some extent in the case before the court, in which school directors of one board contracted to pay and the same or another set of directors refused payment. A court asked to construe the provisions of a contract under such or similar circumstances may well hold itself free to do so without being influenced by the views entertained or even acted on by the cor-

porators, especially in a case involving public interests.”

¹Adrian (Mich.) Water-works v. City of Adrian (1887), 64 Mich. 584; s. c., 31 N. W. Rep. 529. The court said:—“Defendant insists that it is made a condition precedent to payment for this water or to acceptance of the works that the water shall be taken from the wells and springs and that it shall be sufficient in quantity, before defendant is obliged to accept the works, to supply all the inhabitants of the city for thirty years with wholesome water for domestic and fire purposes, and that the performance of this condition must be alleged in the declaration. . . . The several clauses of the contract must be construed together and the intent

§ 1332. No exclusive right.—It has been held in Pennsylvania that a water company had no exclusive right to lay its pipes in the streets, or to supply water to the inhabitants, by reason of the statute which provides that “the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized, and divided among its stockholders, during five years, a dividend equal to eight per cent. per annum upon its capital stock,” as against an individual who had introduced water into a borough with its consent before the water company acquired its charter.¹

§ 1333. Rent of hydrants.—The fact that an ordinance granting a person the right to supply water to a city and its inhabitants, and agreeing that the city should pay a certain annual rent for hydrants, was passed irregularly, and procured by such person’s bribing members of the council, will not affect the right of a water company that purchased such person’s franchise without notice of the irregularity and fraud, and expended money in the construction of water-works, to recover the agreed rent for hydrants actually furnished to and used by the city.² And where a water company, under an

of the parties arrived at from the whole instrument. It provides in positive and unmistakable terms when the contract shall be completed in section 7. It would be an unreasonable and strained construction of the contract to hold that the company must in advance of its requirement for use for twenty or thirty years have a supply of water sufficient to supply all the inhabitants the city will contain twenty or thirty years hence.”

¹ Appeal of Freeport Water-works Co. (1889), 129 Pa. St. 605; s. c., 18 Atl. Rep. 560. Paxson, C. J., said:—“The evident object of the [statute] was to encourage the formation of water companies to supply the in-

habitants of small towns with water, and to that end prohibited the formation of rival companies until they should have become profitable; but it was never intended that said companies should interfere with rights vested prior to their formation, nor to place municipal corporations at their mercy for a supply of water. In this view, the law is wholesome and can do no harm. In the view contended for, it might become an engine of oppression.” See, also, Lehigh Water Company’s Appeal, 102 Pa. St. 515.

² Burlington Water-works Co. v. City of Burlington, 43 Kan. 725; s. c., 23 Pac. Rep. 1068. The following is from the opinion of the court:—

agreement with a city, furnishes to a city and its inhabitants water, and to the city the use of certain hydrants, and the water appears and is believed to be good, and is received by the city and its inhabitants without objection for about a year; the city when it is sued for the rent of the hydrants cannot then set up, as a full, complete and absolute defense to the action, that the water furnished by the company was not good.¹

§ 1334. Water-works companies under New Jersey statutes.—The New Jersey statute entitled “An act for the construction, maintenance and operation of water-works for the purpose of supplying cities, towns and villages of this State with water” authorizes the formation of more than one company in a city, town or village for the purposes designated.²

“After a city through its officers and another have united in carrying on and consummating a fraud and conspiracy whereby they have induced an innocent third person to expend large sums of money for the benefit of the city and its inhabitants, and upon an agreement that such city would pay for a certain named portion of such benefit to be received by it, may the city then, after it has received the contemplated benefit and as against such innocent third person, repudiate the agreement and refuse to pay for any portion of such benefit because of the original fraud and conspiracy entered into and consummated by itself or its officers and the other original party? We would think not.”

¹ *Burlington Water-works Co. v. City of Burlington*, 43 Kan. 725.

² *State v. Consumers' Water Co.*, 51 N. J. Law, 420; s. c., 17 Atl. Rep. 824. The prosecutor rested its claim of an exclusive franchise on three grounds, two of which were as follows:—First, the words of the act in providing “that any number of persons not less than seven . . . may form a

company for the purpose of constructing, maintaining and operating water-works in any city, town or village, . . . for the purpose of supplying such city, town or village and the inhabitants thereof with water;” secondly, the fact that the consent of the municipal authorities was by the statute made necessary for the creation of the company. The court said:—“The first reason, because the act speaks of the formation of a company and not of companies in any city, town or village, has no substance. Similar language is used in our general corporation act, general railroad law and general canal law, but it has never been suggested or supposed that they conferred exclusive franchises. Under the railroad and canal laws, also, the locality in which each company is to operate must be as precisely defined as under the statute which we are now considering. Nor has the second ground any firmer support. It is as reasonable to assume that the local authorities were invested with the right of giving or withholding consent in order that they might act

The statute of New Jersey which authorizes the formation of water companies to supply municipalities with water has been held not to be void, as special legislation, though it applies solely to municipalities having populations ranging between five hundred and fifteen thousand, since the legislature might reasonably conclude that a difference in the size of the various municipalities within the State would necessitate a difference in the method of supplying them with water.¹ A water company lawfully formed under the New Jersey statute authorizing the formation of corporations to supply water to cities, towns and villages acquires, at its incorporation, by force of the statute, a right to lay its pipes in the public highways, and the only control which the local authorities may exercise over it in laying its pipes is such as may be necessary to prevent it doing anything which will unnecessarily obstruct or otherwise interfere with public travel.²

§ 1335. Infringement of riparian rights.—It has been held in New York that a water company organized under the statute of that State for the purpose of supplying water to villages which authorizes the acquisition of riparian rights for that purpose, and water commissioners of a village acting with it, after acquiring land above and below the land of another on the river intended as the source of supply, and expending large amounts in the construction of reservoirs and dams for its purposes, and beginning condemnation proceedings against this other party to acquire his water rights and proposing to erect a dam and reservoir on his land, should be enjoined from so doing, it appearing that these rights were necessary to the other party, and to allow them to divert the water at that point would greatly injure him.³ It has also been held in the same State that water companies organized under that statute cannot, in exercising the authority given them to have, hold and occupy any of the waters of the

upon an attempt to form a second or third company as to suppose that such right had reference to the first company itself. The public interests of the municipality might be involved in the later applications as greatly as in the earliest one."

¹ State v. Moore (N. J.), 22 Atl. Rep. 993.

² Atlantic City Water-works Co. v. Consumers' Water Co. (1888), 44 N. J. Eq. 427.

³ Pocontico Water-works Co. v. Bird (1889), 4 N. Y. Supl. 317.

State, with the provision that they cannot in so doing infringe on any private right, are entitled to divert from the streams upon which they have acquired land for a reservoir the surplus water above what is required by lower riparian owners for the uses to which they have been accustomed to devote it, but they cannot divert the water required by them for such uses.¹ A borough in Pennsylvania has a right to take as much water from a flowing stream as is necessary for the uses of its inhabitants, proper compensation being made for injury resulting therefrom to riparian proprietors above or below, under the authority given in the borough act "to provide a supply of water for the use of its inhabitants, to make all needful regulations for the protection of the pipes."²

§ 1336. The right to waters of a stream.—It has been held in Pennsylvania that a private corporation, vested with the right of eminent domain for the purpose of supplying a city with water, does not, by the mere purchase of land on which is a spring, acquire the right to divert the water of the spring from its natural channel, in order to supply the city with water, without making compensation or tendering security, since its purchase of the land gives it merely the rights of a riparian owner.³ It has also been held in Vermont that a

¹ *Crownen v. Wellsville Water Co.*, 3 N. Y. Supl. 177.

² *Appeal of Haupt* (1889), 125 Pa. St. 211; s. c., 23 W. N. C. 545; 17 Atl. Rep. 436, in which case it was held that a borough which had constructed a reservoir on a tract of land purchased by it through which a creek flowed, and conveyed the water several miles to the borough for the use of its inhabitants, had rights more than those of a riparian owner, having the power to condemn, as stated in the text, and was entitled to an injunction to restrain another borough from taking water from the same stream for the use of the latter, the supply of water being limited.

³ *Lord v. Meadville Water Co.* (Pa.),

19 Atl. Rep. 1007; s. c., 26 W. N. C. 110: "It was conceded upon the argument that the company had the power to divert it under its power of eminent domain. But it has never exercised such right. To do so involves compensation to those who are or may be injured by such diversion. Compensation was not made nor security tendered. While a city or borough or company having the right of eminent domain may take a spring or stream of water to supply a municipality, it can only do so by making compensation to those who are deprived of the use of the water as provided by the constitution. A taking without compensation is a trespass, as much so as the taking of land by a railroad company to con-

water company authorized by its charter to take water from a stream, by purchase or otherwise, to supply a town with water "for the extinguishment of fires, and for domestic, sanitary and other purposes," had no right as against the mill-owners on the stream below its dam to take more water than is ordinarily needed for the purposes enumerated, in order to use the surplus for its own benefit in supplying power to manufactories, though this larger supply might be necessary to protect the town in case of a general conflagration.¹ It has been held that a water company was not restricted, under a Maine statute which authorized it to "take, detain and use the water of Oyster River pond and all streams tributary thereto," to such a taking as would not interfere with the natural flow of the stream below the pond, nor to a detention of the waters in reservoirs outside of the pond, but was authorized to detain such waters in the pond itself.² And a notice by such water company, pursuant to the terms of its charter, that it would take from a pond as much water as

struct its road without making compensation or filing a bond with security as provided by law. Where the power to take exists it must be exercised according to law. If it is not, the corporation so taking becomes a trespasser and may be proceeded against as such. It is a mistake to assume that the purchase of this acre of land gave the company an absolute right to the spring of water. The water did not pass by the deed beyond its reasonable use by the vendee as a riparian owner."

¹ *In re Barry Water Co.* (Vt.), 20 Atl. Rep. 109.

² *Ingraham v. Camden & R. Water Co.*, 82 Me. 335; s. c., 19 Atl. Rep. 861. "It is contended for the complainants," said the court, "that inasmuch as the act allows an appropriation of the waters of the pond and its tributaries above the pond and makes no mention of the brook below the pond, the implication is that the natural flow of the brook is

not to be prevented, and that the corporation are to take only such surplus water as can be diverted without injury to a beneficial use of the flow of the brook as heretofore customarily enjoyed. And it is contended that the intention of the act was not that the corporation would retain the waters wholly within the limits of the pond, but that they would carry its surplus in a state of high water off into reservoirs to be established in other places. We think it a strained construction of the act to say that the defendants must divert the waters of the pond in such a manner and to such an extent and at such times that there will be no interference with any rights of proprietors on the brook below. The act authorizes the corporation to detain the waters of the pond — not merely a portion — but all of them. No words qualify the amount to be taken. The grant is absolute."

might be required by it, not exceeding seven hundred and fifty thousand gallons in twenty-four hours, was held sufficiently definite as to the quantity taken to estimate the damage to lower proprietors, as it would be presumed that the company consumed the entire amount specified.¹

§ 1337. **Connecting pipes.**—A water company having a contract with a city by which it has the right to maintain water-works, and to lay down pipes and mains in and along all the streets and alleys of the city, for the purpose of supplying water for domestic and other purposes, where those taking water for private use were required to construct and keep in repair at their own expense the pipes and fixtures on their premises connecting with the pipes in the streets, has no power to prevent a plumber from laying connecting pipes on private premises at the instance of the owners thereof, nor to require a bond for the payment of any damages caused by the negligence of the plumber in his work.² Neither can a city in such a case delegate to the water company the power to require a license from plumbers employed by citizens to lay such connecting pipes.³

¹ *Ingraham v. Camden & R. Water Co.*, 82 Me. 335; s. c., 19 Atl. Rep. 861.

² *Franke v. Paducah Water Supply Co. (Ky.)*, 11 S. W. Rep. 432, 718. The court remarking that the contract ordinance conferred no power on the company to prescribe the qualifications of a plumber, etc., proceeded as follows:—"If such a power had been conferred it would be in plain violation of the fundamental law of the city. A delegation of power to one corporation or to one man in a city to determine who shall exercise a particular trade, and to provide penalties for misconduct or neglect in the discharge of his duties, is also in plain violation of the organic law. The effect of this legislation on the part of the appellee (the company) is to destroy the trade and profession of the appellant and to compel the citizen either to employ the company or some one named by it, and none

other, to enter on his premises and perform labor for his private use that the company is under no obligation whatever to perform. That the connection should be properly made cannot be questioned, and by one competent to make it, but the right of determining who is qualified is not with the company. That the council of the city may require a license of all plumbers for the protection of the people from fraud and imposition may be conceded; but when such power is conferred upon a corporation it is such a delegation of legislative control as cannot be sanctioned. In this case the exercise of appellant's avocation in the city where he lives is destroyed, and the right of its citizens placed in the hands of the corporation to be disposed of as the corporation may see proper."

³ *Franke v. Paducah Water Supply Co.*, *supra*.

§ 1338. **Liability of water-works companies.**—The Iowa Supreme Court has held that the statute of that State which authorizes cities to contract for the building and operation of water-works by individuals or companies confers no power to contract with such individual or company to indemnify a citizen or tax-payer for damages which he may sustain by reason of a failure to furnish water as provided in the contract, so as to enable the citizen to maintain an action in his own name.¹ And he cannot maintain such a suit even though a specified fund has been raised by the city by taxation to pay for a sufficient supply of water for use in case of fires, and the plaintiff has contributed to such fund.² It was also held in this case that the ordinance providing that the water company should be liable for all injuries to personal property caused by its negligence in the construction or operation of said works, and, should the city be sued therefor, upon notification it should be the duty of the company to defend or settle such suit, referred only to injuries for which the city would be liable if caused by its negligence, and hence no action would lie against the water company for the burning of property by reason of the insufficient supply of water, as none would lie against the city in such case.³

§ 1339. **The same subject continued.**—In an action for the value of property destroyed by fire as alleged by reason of a water company's not furnishing a sufficiency of water under

¹ *Becker v. Keokuk Water-works* (1890), 79 Iowa, 419; s. c., 44 N. W. Rep. 694. The court said:—"Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed." *Clark v. City of Des Moines*, 19 Iowa, 212; *McPherson v. Foster*, 43 Iowa, 57.

² *Becker v. Keokuk Water-works*, *supra*, cited in the preceding note.

³ *Becker v. Keokuk Water-works*,

supra. See, also, *Vanhorn v. City of Des Moines*, 63 Iowa, 448, deciding that the city was not liable for the failure of the water-works company to furnish the water required by its contract to extinguish fires, even though the city had taken a contract from the company to protect it from liability which might arise from malfeasance or neglect on the part of the company; further, that the city could not assume a liability for negligence where none was imposed by law, and that the contract of indemnity must be regarded as having reference to existing grounds of liability and not as creating new ones.

its contract with a city, it was held by the Court of Appeals of Kentucky that where a water company makes a contract with a city, the declared object of which was the protection of private property against fire, an action against the company for the destruction of property by fire, caused by the failure of the company to supply a sufficient amount of water to extinguish it, could not be defeated on the ground that the plaintiff's damages were not the proximate result of the company's negligence;¹ also that the contract of this water company with a city having declared that it was made for the protection of private property against destruction by fire, and provided that the city might rescind it for failure of the company to furnish an adequate supply of water for five months, and that the rents should cease in case the water supply was cut off more than five days, it was held the only exemption from liability contained in the contract being for damages occasioned by a temporary suspension of the works, upon notice, for repairs or extension, the necessary inference must be that, in the absence of such excuse, and while the contract was in force, the company would be liable for its failure to furnish water sufficient to extinguish fires.² And on a petition for rehearing the court held that the contract did not create between the city and the company the relation of principal and agent, and the doctrine of *respondet superior* could not be invoked to relieve the company of liability to a citizen for loss by reason of its failure to keep up such supply.³

§ 1340. **Water-rates.**—It has been held that the constitution of California, in its provisions as to water rates, etc., did not make the board of supervisors part of the legislative department of the State, but that the power granted to it was to fix reasonable rates and just compensation.⁴ Where such board of supervisors have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without reference either to the expense necessary

¹ Paducah Lumber Co. v. Paducah Water Supply Co. (Ky.), 12 S. W. Rep. 554.

² Paducah Lumber Co. v. Paducah Water Supply Co. (Ky.), 12 S. W. Rep. 554.

³ Paducah Lumber Co. v. Paducah Water Supply Co. (Ky.), 13 S. W. Rep. 249.

⁴ Spring Val. Water-works v. City and County of San Francisco (1890, 82 Cal. 286; s. c., 22 Pac. Rep. 910.

to furnish the water or what is a fair and reasonable compensation therefor, so as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the property invested in the business, a court of equity has jurisdiction to set aside such ordinance and direct the board to fix such rates as the constitution provided for.¹ In an action to set aside an ordinance regulating water-rates, it is not necessary that the mayor of the city should be made a party defendant.²

§ 1341. **The same subject continued.**—It is not necessary that the board should give notice to parties furnishing water of an intention to fix the rates, the notice not being provided for by the constitution; but it is the duty of the board to obtain all information necessary to act intelligibly and fairly.³ It is not an unreasonable regulation that the meter should be supplied by the party furnishing water.⁴ An ordinance is not objectionable for uncertainty in that it gives every householder the option to require a meter, and to pay for the water used at water-rates which are different from house-rates, as the rates are fixed.⁵ Under the constitution and statutes of California authorizing the board of supervisors to fix the rates at which water shall be sold, rented or distributed by a corporation furnishing water to the general public for profit, the board of supervisors of a county have no power to fix the rate for a corporation organized to furnish water to the stockholders only.⁶ A city authorized by statute to furnish water to its inhabitants to be paid for by them, which has received from a householder payment in advance for water to be furnished, is liable in damages in an action at law for cutting off his supply, because his predecessor in title had not paid the water-rent for the preceding year.⁷

¹ *Spring Val. Water-works v. City and County of San Francisco*, 82 Cal. 286; s. c., 22 Pac. Rep. 910.

² *Spring Val. Water-works v. City and County of San Francisco*, 82 Cal. 286.

³ *Spring Val. Water-works v. City and County of San Francisco*, 82 Cal. 286; s. c., 22 Pac. Rep. 910.

⁴ *Spring Val. Water-works v. City and County of San Francisco*, *supra*.

⁵ *Spring Val. Water-works v. City and County of San Francisco*, *supra*.

⁶ *McFadden v. County of Los Angeles*, 74 Cal. 571; s. c., 16 Pac. Rep. 397.

⁷ *Merrimack River Sav. Bank v. City of Lowell*, 152 Mass. 556; s. c., 20 N. E. Rep. 97. It was argued that the

§ 1342. **Collection of water-rents.**—A water company may provide by by-law that if water-rent is not paid the supply shall be cut off until all arrears and expenses of shutting off are paid.¹ Where the charter of a water company provides that the real estate to which water is supplied shall be bound for the water-rent, there would be a lien upon land in the hands of a purchaser, where such water-rent was due and unpaid by the grantor when he sold the same.² It has been held in Missouri that in an action by a city for the value of water used through a secret pipe, not connected with a meter, what defendant said with reference to such pipe could be shown by any one who heard it; but evidence of a third person of what the defendants' employees told such third person that defendants had said to them was mere hearsay and should be excluded. It was competent for the inspector, in describing how he and his assistant discovered the secret pipe, to relate what directions he gave his assistant in the matter. And evidence in such an action of the cost of the water-works as a basis of water-rates was irrelevant and inadmissible.³ The Omaha water-works ordinance provides that the company shall furnish water to citizens residing along the line of its mains at

city was merely performing a public service and that the rates paid for water by individuals were special taxes, and that there was no contract or obligation on the part of the city to furnish water after a payment beyond the public duty which it owed to all the inhabitants, and that the plaintiff's remedy if any was by a writ of *mandamus*. The court said:—"Special payments are made by individuals only when they are supplied with water at their request and then only for what is furnished and for the time that it is furnished. While these may be called special assessments for the use by the individuals of particular privileges which are part of a general provision for all the people, it seems to be more consistent with the nature of the transaction to consider them as pay-

ments of the price of a commodity sold under a general authority to provide for the public, and to sell upon request in a reasonable way to the persons who constitute the public. *Tindley v. Salem*, 137 Mass. 171, *In Stock v. City of Boston*, 149 Mass. 410, it was assumed both by counsel and the court under a similar statute that the city of Boston having complied with the request of an applicant to deliver water by pipes at his greenhouse, and presumably having been paid for it, was under a contract to continue to deliver."

¹ Appeal of Brumm (Pa.), 12 Atl. Rep. 855.

² Appeal of Brumm (Pa.), 12 Atl. Rep. 855.

³ *City of St. Louis v. Arnot* (1887), 94 Mo. 275; s. c., 7 S. W. Rep. 15.

certain rates, and gives a tariff for dwelling-houses according to the number of rooms and other buildings of different kinds. Rents for other purposes are fixed by meter-rates, lowering inversely to the amount of water taken. It has been held that the company had the right to treat each building separately; and the United States, as owner of the Fort Omaha reservation — a tract of many acres, on which are dwellings for officers, hospitals, warehouses and barracks — was not entitled to be supplied as a single consumer.¹

§ 1343. Power of municipality to contract for lights.—

An injunction should not be granted in an action brought by a private citizen to restrain the mayor and council of a city from entering into a contract to have the streets lighted by electricity, upon allegations that a prior contract had been made with a gas-light company, which was yet in force, and that, by making the second contract, the city would increase its indebtedness, where it is not shown that the gas-light company had the ability or desire to perform its contract, nor that the city or the plaintiff would sustain any substantial injury by the contemplated act.² A cash contract for current supplies, such as lamps and gasoline for lighting the streets, can be made by a municipal corporation through its appropriate officers or committees, as effectually as by formal order or resolution entered on its minutes.³ And such a contract, if not authorized or confirmed in the mode commonly practiced, may become obligatory by implied ratification, as by taking the fruits of the contract and enjoying them for a considerable time, without notice of objection.⁴

¹ *United States v. American Water-works Co.* (1889), 37 Fed. Rep. 747.

² *Searl v. Abraham*, 73 Iowa, 507; s. c., 35 N. W. Rep. 612.

³ *City of Conyers v. Kirk*, 78 Ga. 480; s. c., 3 S. E. Rep. 442.

⁴ *City of Conyers v. Kirk*, 78 Ga. 480. "Against this view of ratification," said the court, "and all theory of implied contract, the counsel urged upon us . . . the suggestion that the constitution would protect the city against this

claim by virtue of the limitation which it puts upon municipal corporations touching the power to create debts. The facts of this case taken most strongly in favor of the prevailing party, as they must be after verdict, do not show any purpose or intention to create a debt. The debt resulted from a breach of the contract and not from the making of it. Against paying a debt so originating there is no constitutional impediment. When a cash purchase

§ 1344. **The same subject continued.**—It has been held that there was no power conferred upon a city in West Virginia by its charter or the general statute in relation to municipal corporations in force in West Virginia in 1864 to delegate to a private corporation the exclusive privilege of using the streets and alleys of the city for laying gas-pipes and furnishing the city and its inhabitants with gas for thirty years.¹ It is within the legal discretion of a city council to select any system that will furnish lights of the required brilliancy at the lowest rates.² Contracts for lighting cities are limited by a provision in the New Jersey statute giving them power to order any public street to be lighted, and to make and enter into contracts therefor with any other parties, "and to cause the annual expense thereof" to be certified, etc.³ A grant by a city to a gas company of the exclusive privilege of lighting the city with gas does not deprive the city of the power to contract with an electric light company for lighting the city with electric lights.⁴

is made there is no expectation that any debt will exist; and there was no such contemplation in this case. If we take the evidence as we do, most favorably for the plaintiffs, there was no intention that any debt should arise. It was contemplated that payment should be made as soon as the articles were delivered; and the reason indicated in the record why payment was not then in fact made was the extended absence of the city treasurer from his office. So that this debt (and it is a debt now) became such not by virtue of making the contract but by virtue of breaking the contract; and surely there never can be and never will be any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have it—the cash sufficient for the purpose being then in the debtor's treasury." See, also, *Mayor &c. v. McWilliams*, 67 Ga. 106.

¹ *Parkersburg Gas Co. v. City of Parkersburg*, 30 West Va. 435. The court in its opinion in *Wright v.*

Nagle, 101 U. S. 796, says:—"Exclusive rights to public franchises are not favored. If granted they will be protected, but they will never be presumed. Every statute which takes from a legislature its power will always be construed most strongly in favor of the State. These are elementary principles." In *Charles River Bridge v. Warren Bridge*, 11 Peters, 544, it was directly determined by the Supreme Court of the United States that no franchise was exclusive unless so asserted to be by the unmistakable terms of the grant. See, also, *Richmond &c. v. Bridge Co.*, 11 Leigh, 521; s. c., 13 How. 71; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *State v. Gas Co.*, 18 Ohio St. 262; *Gas Light Co. v. Middletown*, 59 N. Y. 228.

² *City of Detroit v. Hosmer*, 79 Mich. 384; s. c., 44 N. W. Rep. 622.

³ *Taylor v. City of Lambertville* (N. J., 1887), 10 Atl. Rep. 809.

⁴ *Parkersburg Gas Co. v. City of Parkersburg*, 30 West Va. 435; s. c., 4 S. E. Rep. 650.

§ 1345. **Authorized contracts illustrated.**—It has been held in Louisiana that the council of a city might make a contract for lighting for more than one year where there was a charter provision that it should have power to pass such ordinances as might be necessary to light the streets, etc., and their power in this regard was not limited by other provisions for annual levies to meet current expenses.¹ Nor was a stipulation in a contract made by the city with an electric light company to furnish it lights for ten years, at a given price per light, that the city shall annually appropriate out of its current revenues a sum sufficient to pay what is then due under the contract, within the prohibition in the general statutes of a city's contracting any debt without providing means in the same ordinance to pay both principal and interest.² Nor was such a contract a restriction upon the legislative power of the council.³ A city which has absorbed by

¹ *New Orleans Gas-light Co. v. City of New Orleans*, 42 La. Ann. 188; s. c., 7 So. Rep. 559.

² *New Orleans Gas-light Co. v. City of New Orleans*, *supra*. See, also, *Weston v. Syracuse*, 17 N. Y. 110; *City of Valparaiso v. Gardner*, 97 Ind. 1.

³ *New Orleans Gas-light Co. v. City of New Orleans*, *supra*. "The power to legislate conferred upon the city by its charter has reference to its power to legislate for governmental functions, such as passing and enforcing ordinances to govern itself, and authorized under what is known as the "police power;" and it is distinct from the power to contract, which is similar in its effects to the right of contracting as exercised by natural persons. Hence the rules of law and the principles settled in jurisprudence which prohibit municipal corporations from legislating future restrictions to its own legislative power are not applicable to a time contract entered into by such a corporation. These views find sanction and ample support from numerous

decisions rendered by courts of last resort in our sister States on precisely similar questions. *Indianapolis v. Gas-light Co.*, 66 Ind. 396; *Weston v. Syracuse*, 17 N. Y. 110; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Waterworks Co. v. Atlantic City* (N. J.), 6 Atl. Rep. 24. The rule established by jurisprudence seems to be that in the absence of special legislative prohibition or restriction, a municipal corporation vested with the general power to make a contract for the supply of gas or any other commodity has the right to make it according to its own discretion as to its prudence or good policy within the limits of its franchise, including the power to make it for more than one year, if by thus contracting it believes that better terms or lower rates can be obtained. After a thorough examination of our legislation on the subject, and an exhaustive study of our own reports, we find no law, reason or authority which would justify us in removing the present case from the effect of this general rule."

consolidation another city is burdened with the contracts which a gas-light company had with the latter at the time of consolidation for lighting its streets.¹

§ 1346. Unauthorized contracts.— Authority to a city to cause its streets to be lighted, and to make reasonable regulations with reference thereto, does not authorize the grant of an exclusive right to one company to furnish gas for thirty years.² The Supreme Court of South Carolina has held that where the charter of a city gave the city council power to make all needful police regulations for the welfare, convenience and safety of its citizens, the power to light the streets might be lawfully exercised, and the council might purchase and operate an electric light plant for that purpose.³ But a purchase by the city council of an electric light plant, for the purpose of lighting the streets of the city, and also supplying electric light to private houses and business buildings, was *ultra vires*, as being outside of the police power of the city.⁴

§ 1347. Contract for gas-lighting construed.— A city may treat a contract with a gaslight company for the exclusive privilege of laying gas mains and pipes under its streets for a term of years, on condition that the city shall have the right to purchase the company's gas plant at a certain time, on refusal by the company to sell at that time, as annulled, so far as the grant of the exclusive privilege is concerned.⁵ The court, however, held that if the grant was on condition that the city shall have the privilege of purchasing the plant at the expiration of twenty-five years, "at such price as may be determined by five disinterested men," two of whom are to be chosen by the city, two by the company, and the fifth by those four, the city must make its election as to the purchase at a price to be thereafter determined by appraisers to be thereafter appointed, and, until it exercises this option, the

¹ Jefferson City Gas-light Co. v. City of New Orleans (1889), 41 La. Ann. 91; s. c., 5 So. Rep. 262.

² Saginaw Gaslight Co. v. Saginaw (1886), 28 Fed. Rep. 529.

³ Mauldin v. City Council of Greenville, 33 S. C. 1; s. c., 11 S. E. Rep. 484.

⁴ Mauldin v. City Council of Greenville, cited in the preceding note.

⁵ Montgomery Gaslight Co. v. City Council (1889), 87 Ala. 245; s. c., 6 So. Rep. 113.

company was not bound to proceed with the appraisement; and its refusal to appoint two appraisers, after the city had appointed two, the city not having elected to purchase, was not a breach of the contract.¹ And on a bill by the company to enjoin the city from granting the privilege of laying gas-pipes in the streets to others, filed more than twelve years after the expiration of the time "at" which the city was to have the privilege of purchasing the plant, it was not required to embody an offer to sell in its bill.²

§ 1348. **The same subject continued.**— The Kentucky Court of Appeals has held the authority in the charter of a city to "construct, maintain and operate gas-works, and to pass all ordinances necessary to regulate the same," to be a general one to have the city lighted with gas, including the power to enter on the streets for the purpose of laying pipes, and the power to contract for furnishing the city with light. And a contract thus made with a gas company, by which exclusive right is given to furnish gas to the city for public and private use for twenty-five years, and the exclusive right to enter the streets to lay its pipes, was held to be one which might be enforced; and where the city subsequently contracted with another company to furnish light, and authorized it also to enter on the streets to lay its pipes, injunction would lie to preserve the franchise granted the first company.³ A contract between a company and a city as to lighting it by gas, electricity or any other mode is authorized where the charter of an electric light company authorizes it to "furnish any city . . . with gas or other light for such time, and upon such terms, as may be agreed upon by the parties," and the charter of a city gives it power to contract and provides that its board of councilmen should have power "to construct, maintain and operate gas and water-works, and to pass all ordinances necessary to regulate the same."⁴ There was a contract with a gas company for lighting the streets of a city with a provision that the company might adopt "any other

¹ *Montgomery Gaslight Co. v. City Council*, 87 Ala. 245.

² *Montgomery Gaslight Co. v. City Council*, *supra*.

³ *City of Newport v. Newport Light Co.* (1889), 84 Ky. 166.

⁴ *City of Newport v. Newport Light Co.*, 89 Ky. 454; s. c., 12 S. W. Rep. 1040.

mode equal to gas for supplying light to the city and its inhabitants," etc. There being named in the ordinance no use of the streets except for gas apparatus and fixtures, it was held that a consent on the part of the city would be necessary in case of a light other than gas requiring a different use of the streets, such as the erection of poles upon which to stretch wires for electric illuminating purposes.¹

§ 1349. Construction of statutory and charter provisions.

A municipal ordinance granting a franchise to occupy the city streets with poles and wires for the purpose of distributing electric light and power is within the provisions of the Iowa statute which provides that municipal corporations shall have power to authorize the erection of gas-works or electric light plants upon approval by a majority of the voters of the city at a general or special election.² Where a city ordinance grants the right to transmit electric light and power, the further grant therein of a privilege to conduct to the electric light plant water from an artesian well flowing at the intersection of two streets in the city is incident to the object of supplying electricity, and does not contravene the statute which prohibits the passage by a municipal corporation of any ordinance containing more than one subject.³ A gas company may be chartered by the legislature for the purpose of supplying a city with gas, without regard to the wishes of the city in the premises; and the city may not prevent the corporation from laying pipes under the streets.⁴

§ 1350. The same subject continued.—It has been held in Nebraska that a city will be compelled to pay the fair value of light actually furnished and used by it under a contract with a corporation of which a member of the city council was a stockholder, notwithstanding the declaration of the statute that the interest of any officer of a city in a contract to which the city is a party shall avoid the obligation thereof.⁵ Where

¹ *City of Newport v. Newport Light Co.*, 88 Ky. 454; s. c., 12 S. W. Rep. 1040.

² *Hanson v. Wm. A. Hunter Electric Light Co. (Iowa)*, 48 N. W. Rep. 1005.

³ *Hanson v. Wm. A. Hunter Electric Light Co.*, *supra*.

⁴ *Atlanta v. Gate City Gas-light Co.* (1885), 71 Ga. 106.

⁵ *Grand Island Gas Co. v. West*, 28 Neb. 852; s. c., 45 N. W. Rep. 242.

a city furnishes gas to its inhabitants under an ordinance which provides that the use of gas may be refused until all arrearages for gas used on the premises have been paid, it cannot be compelled by *mandamus* to furnish gas to the occupant of a building whose previous tenants are in arrears for gas, such ordinance being a proper and reasonable one.¹ The validity of an ordinance giving a gas company the perpetual and exclusive right to furnish gas to the city does not arise in an action by the company for gas furnished the city under that ordinance.² And a gas company which supplies a city with gas under an ordinance providing that it shall be "at rates as favorable" as those of another company in a neighboring city cannot charge rates in excess of those charged at the same time by the other company.³

¹ Commonwealth v. City of Philadelphia (1890), 132 Pa. St. 288; s. c., 19 Atl. Rep. 136.

² Decatur Gas-light & Coke Co. v. City of Decatur (1890), 24 Ill. App. 544.

³ Decatur Gas-light & Coke Co. v. City of Decatur (1890), 24 Ill. App. 544; affirmed in 120 Ill. 67; s. c., 11 N. E. Rep. 406.

CHAPTER XXXIV.

PUBLIC EDUCATION.

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| <p>§ 1351. Introductory.</p> <p>1352. Constitutional provisions and State statutes.</p> <p>1353. Legal <i>status</i> of school system.</p> <p>1354. State board and superintendent of education.</p> <p>1355. County superintendents.</p> <p>1356. Change of boundaries of school districts.</p> <p>1357. Presumption of legal organization of district.</p> <p>1358. District school boards.</p> <p>1359. Meetings of district school boards.</p> <p>1360. Prescribing text-books — Rescission of resolution.</p> <p>1361. Power of board of school trustees to contract.</p> <p>1362. Power to require parents to sign and return teacher's report.</p> | <p>§ 1363. Fiduciary capacity.</p> <p>1364. Limitation of powers.</p> <p>1365. Personal liability of directors.</p> <p>1366. Meetings of district electors — Elections.</p> <p>1367. Term of school officer — Holding over.</p> <p>1368. School fund.</p> <p>1369. The same subject continued — <i>Mandamus</i> to State comptroller.</p> <p>1370. School taxes.</p> <p>1371. School lands.</p> <p>1372. School bonds.</p> <p>1373. School teacher — Appointment — Contract — Removal.</p> <p>1374. Pupils.</p> <p>1375. Race question in schools.</p> <p>1367. Bible in schools.</p> <p>1377. Actions and defenses.</p> |
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§ 1351. Introductory. — Public educational institutions are a development of modern times. Some of the earlier lights, as Erasmus in the Renaissance and Luther in the period of the Reformation, seemed to have recognized the necessity for a national system of education; and Pestalozzi presented to Napoleon, in the height of his power, an earnest appeal that the education of the masses might be considered in the scheme of his great enterprises, but he met with the reply that the first duty of every citizen was to become a soldier and after that he could study the alphabet. Germany was perhaps the first to establish an organized system of public schools. There the question was handled from a national standpoint, and the world has learned her best lessons of public instruction from that source. Great Britain relied upon parish organization

and assessment upon local land-holders, and this system was maintained until a very late date, when the matter was taken up by the parliament and fully revised and modified.¹ The same parochial system prevailed in the United States and proved inadequate, to the end that there was very little provision for the education of the young in the early part of the century, except that which was derived from the parish priest or some theological student who might be enlisted to take charge of the local school.²

§ 1352. Constitutional provisions and State statutes.—With the formation of the several States of the Union, provision was made without exception for the education of the people. The language by which it is expressed in the several constitutions is substantially the same, sometimes reciting “that a diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature to encourage the promotion of intellectual and scientific improvement,” and again providing directly for free schools, and setting apart certain funds for that purpose. The spirit of all of them is however to the effect that it is the duty of the State to provide educational facilities for the people. The constitution of the United States has no direct provision authorizing the federal government to establish a national system of education, unless that clause providing for the general good of the people could be construed sufficiently broad for that purpose. But it is not likely that such a construction would be maintained in view of the fact that the States have made ample provision for this matter. The national government has, however, provided a bureau of education at Washington for the purpose of collecting statistics of facts showing the progress, state and condition of education in the United States, and distributing information with regard to the same.³ Pursuant to these constitutional provisions the States have enacted laws establishing complete systems of education. These statutes vary

¹ Elementary Education, Act of the United States, pp. 24-27; Story 1870; Am. Ed. Encyc. Brit., tit. Education on Const., p. 51.

² McMaster's History of the People

³ Rev. Stat. U. S. (2d ed., 1878), §§ 516-519; Am. & Eng. Ency. Law, tit. Education.

in many particulars, but in their material elements they are the same. The general plan or scheme upon which they are based is substantially as follows:— A board of directors having jurisdiction of the State is vested with the guardianship of educational interests within the State, and usually consists of the governor and treasurer of the State, and a superintendent of public instruction, who is the secretary of the board and in general charge of the State system. A superintendent of education for each county is the representative of the State superintendent in that county. The counties are divided into districts, and a board of school trustees have control of all matters pertaining to the schools within their district. The State board of education prescribe rules and regulations for the management of the schools throughout the State; the text-books that shall be used, the salary of teachers, the standard of examination, and such other regulations as may be incidental and necessary to the general management of the system.

§ 1353. **Legal status of school system.**— The school system consisting of the State board of education and the school districts throughout the State are regarded as a body corporate with power to contract; to sue and to be sued; to hold and convey property of all descriptions; and to do all acts incidental and necessary to such holding. The statutes of some of the States, as that of Dakota, specifically prescribe that the officers of the school system shall be considered a body corporate; but as a rule this has been left to the courts, as where the court said:—“A school district is a body corporate, and may ask the aid of equity to prevent a consummation of illegal and void apportionments, and creation of a debt against it.”¹ But in Kansas a school district is only a *quasi*-corporation.² Again, in Illinois it was held that townships having control of the schools within their boundaries are not municipal corporations, but partake of many of the attributes of a corporation; that is to say, they can only exercise powers expressly conferred by statute.³

¹ School Dist. v. School Dist., 63 Mich. 51; s. c., 29 N. W. Rep. 489; School Dist. v. Bodenbauer (1885), 43 Ark. 140.

² Beach v. Leahy, 11 Kan. 23.

³ People v. School Trustees, 78 Ill. 136; Wharton v. School Trustees, 42

§ 1354. State board and superintendent of education.—It is the duty of the State board of education to prescribe rules and regulations for the government of the schools throughout the State; to select a uniform system of textbooks; to prescribe the salaries of teachers and to apportion the school fund among the several districts in amounts, as prescribed by statute. And the State superintendent is required to make an annual report to the governor of the condition of the schools, and to be generally responsible for their management. The State treasurer, who is a member of this board, is the treasurer of and in charge of the school fund. The State superintendent exercises a general supervision over the schools through his subordinates, the county superintendents, who are required to make periodical reports to him. The county superintendent has a *quasi*-judicial position as regards certain questions; as in Wisconsin, questions arising in the district board are appealed directly to him;¹ and he may prescribe such rules and regulations as he may deem fit in the proceedings; and his decisions are regarded with weight.² He has power to veto certificates issued to teachers, or acts shown to be invalid.³ He may also remove district trustees where they have disregarded the authority of the State superintendent, and disobeyed his directions.⁴

§ 1355. County superintendents.—The county superintendent acts as the deputy of the State superintendent in the county of his appointment. He is clothed with many of the

Pa. St. 358; *Rapelye v. School Trustees*, 1 Edm. (N. Y.) Sch. Cas. 175; *School Dist. v. Thompson*, 5 Minn. 280; *Littlewort v. Davis*, 50 Miss. 403; *School Dist. No. 3 v. Macloon*, 4 Wis. 79.

¹*State v. Witherford*, 54 Wis. 150; *State v. Custer*, 11 Ind. 210.

²*State v. Burton*, 45 Wis. 150.

³*People v. Collins*, 34 How. (N. Y.) 236; *People v. Board*, 126 N. Y. 528; s. c., 27 N. E. Rep. 968.

⁴*People v. Draper*, 18 N. Y. Supl. 282, where it appeared that the trustee had refused to comply with an order

from the State superintendent of instruction, requiring him to discontinue certain proceedings that had been begun against a local board of managers of a normal school, to compel them to pay over certain public school moneys they had received, to teachers employed by the trustees. The court said "that a refusal of the trustee to abandon such proceeding when directed so to do by the superintendent constitutes a wilful disobedience justifying his removal."

powers of the State superintendent to regulate the management of schools within his county. His duties are those of visiting the schools, examining into their condition, the character of the school building, the method of instruction, qualifications of teachers, and to procure an enumeration of the scholars, and from time to time to make reports to the State superintendent. He also has control of the regulation of the boundaries of school districts, and in this regard and in the performance of his duties he is allowed a very large discretion. His position is of a *quasi-judicial* nature.¹ His compensation is usually regulated by *per diem*, or ratably according to the population,² and he is required to have an office within the county; but it was decided that the fact that he did not hold his office at the place where the county-seat was originally located did not render his acts void.³ He is usually required to file a bond for the faithful performance of duty on entering upon the duties of his office,⁴ but it is not necessary that he should qualify as a teacher.⁵

§ 1356. Change of boundaries of school districts.—The matter of the change of the boundaries of school districts lies primarily in the discretion of the county superintendent. Of his own motion he may proceed to submit the question of the creation or change of school districts to the electors of the district, and in some States the question of such a change can-

¹ *Knight v. Woods* (Ind. Sup.), 28 N. E. Rep. 306; *Ind. S. D. v. Duser*, 45 Iowa, 391; *Cowles v. School Dist. No. 6*, 23 Neb. 655; s. c., 37 N. W. Rep. 493; *State v. Clary* (Neb.), 41 N. W. Rep. 256; 25 Neb. 403; *Trustee &c v. Jamison* (Ky.), 15 S. W. Rep. 1.

² *Smith v. County of Jefferson*, 10 Colo. 17; s. c., 13 Pac. Rep. 917; *Pickett v. Harrod*, 86 Ky. 485; s. c., 5 S. W. Rep. 473; *Jimison v. Adams Co.*, 180 Ill. 558; *Pickett v. Adams* (Ky.), 15 S. W. Rep. 865.

³ *School Dist. No. 50 v. Roach* (1889), 41 Kan. 531; s. c., 21 Pac. Rep. 597.

⁴ By the Indiana statutes it is provided that the several county super-

tendents shall file a bond within thirty days from the date of their appointment, and that their office shall be vacant in the failure to perform this requirement; but it was held that where the statute was ambiguous, and the county superintendent had failed to file his bond within the required time, a strict interpretation of the statute would not be made. *Knox County v. Johnson* (Ind.), 26 N. E. Rep. 148.

⁵ *Davis v. School Dist. No. 1*, 81 Mich. 214; s. c., 45 N. W. Rep. 989; *Winn v. State* (Miss.), 7 So. Rep. 353; *State v. Clary*, 25 Neb. 403; s. c., 41 N. W. Rep. 256.

not be presented to the electors without his consent.¹ But the usual course of procedure is that of presenting to the county superintendent, or in some cases to the county court, a petition signed by a designated proportion of the electors of the district. Upon this petition the court or superintendent, as the case may be, is required to authorize the calling of an election and the submission to the electors of the question of the desirability of changing the boundaries.² A change of boundaries will sometimes occur by acquiescence, where for a long period of time the change has been recognized.³ In the annexation of one district to another the consent of the electors is required to be had;⁴ and where there is no express provision to the contrary, each district will remain liable for its debts and retain its property, and there will be no merger of districts until such debts are paid and the affairs of each settled.⁵

¹ *State v. Independent School Dist.*, 42 Minn. 357; s. c., 44 N. W. Rep. 120.

² Requisites of petition: *Carrico v. People*, 123 Ill. 198; s. c., 14 N. E. Rep. 66; *Allen v. Dist. Tp.*, 70 Iowa, 434; s. c., 30 N. E. Rep. 684; *Hudspeth v. Wallis*, 55 Ark. 323; s. c., 15 S. W. Rep. 184; *School Dist. v. School Dist. (Ill.)*, 28 N. E. Rep. 49; *State v. Levertton*, 53 Iowa, 483; *School Dist. v. School Dist.*, 20 Kan. 76. Requisites of notice in calling elections: *People v. Sesson*, 98 Ill. 335; *Haines v. School Dist. No. 6*, 41 Me. 246; *Williamstown G. F. Sch. v. Webb (Ky.)*, 12 S. W. Rep. 298; *People v. Lansing*, 55 Cal. 393; *Reynolds L. & C. Co. v. McCabe*, 72 Tex. 57; *People v. Searle*, 52 Cal. 620; *Bump v. Smith*, 11 N. H. 48; *Wakefield v. Patterson*, 25 Kan. 709; *Donough v. Dewey*, 82 Mich. 309; *Dooley v. Muse (Neb.)*, 48 Mo. 143; *State v. Compton (Neb.)*, 44 N. W. Rep. 660; *School Dist. No. 3 v. School Dist. No. 1*, 63 Mich. 51.

³ *City of Winona v. School Dist. No. 82*, 40 Minn. 13; *Scoville v. Mattoon*, 55 Conn. 144; s. c., 10 Atl. Rep.

511; *School Dist. No. 1 v. School Dist. No. 1*, 81 Mich. 339; *Lauthrop v. Town of Sunderland (Vt.)*, 23 Atl. Rep. 619.

⁴ *Hewett v. Miller*, 21 Vt. 402; *Connor v. Tomkins*, 23 Mo. 443.

⁵ *Needham v. School Dist. No. 6 (Vt.)*, 2 Atl. Rep. 198; *School Dist. v. Town of Greenfield*, 64 N. H. 84; *State v. Grimshaw (Mo.)*, 1 S. W. Rep. 363; *School Dist. v. School Dist.*, 63 Mich. 51; *City of Winona v. School Dist.*, 40 Minn. 13; *Thompson v. Abbott*, 61 Mo. 176; *Aleppo School District's Appeal*, 96 Pa. St. 76; *Manchester v. Reserve Tp.*, 4 Pa. St. 35; *McGurn v. Board of Education*, 133 Ill. 122; s. c., 24 N. E. Rep. 529; *Parker v. Titcomb*, 82 Me. 180; *Gravel Hill School Dist. v. Old Farms School Dist.*, 55 Conn. 244; s. c., 10 Atl. Rep. 689; *Scoville v. Mattoon*, 55 Conn. 144; *Hancock v. Dist. Township of Perry*, 78 Iowa, 550; s. c., 43 N. W. Rep. 527; *State v. Eidson*, 76 Tex. 302; *People v. Gartland*, 75 Mich. 143. As regards the liability of school districts: *School Dist. No. 3 v. Town of Greenfield*, 64 N. H. 84;

§ 1357. Presumption of legal organization of district.—

A school district originally legally organized in one town claimed that a portion of the adjoining town had been annexed to and become a legal part of it. There was no record evidence of the fact. But it was declared that the legal annexation of the part in question might be shown by such conduct of the district and of others with regard to it for a period of forty years as to raise a presumption of such annexation.¹ In a case raising a similar question, the Supreme Court of Vermont used the following language:—"No records of the town were produced to show either the existence or organization of the district, and if no other proof is admissible for that purpose the defendant has failed in making out his title. The court, however, considered that the existence of a school or highway district may be proved by reputation. If the records of the town have been examined and the organization of such districts does not appear of record, their existence in point of fact may be proved. All that is necessary in such a case is to show that there is a district long known and recognized as such. If there are persons claiming to act as inhabitants of a school district within certain boundaries, and who have for a long time acted as a school district, whether those boundaries are designated by any particular lines or by the farms of the individuals belonging thereto, they may be regarded as belonging to a district regularly organized. Without this kind of proof there would be a failure of evidence as to the existence or organization of most of the highway and school districts in this State."²

Board of Education v. Board of Ed., 30 West Va. 424; s. c., 4 S. E. Rep. 640; Ford v. School Dist. (Pa.), 15 Atl. Rep. 812; McKenna v. Kimball, 145 Mass. 555; s. c., 14 N. E. Rep. 789.

¹ State v. Bradley, 54 Conn. 74, where it was held that the district claiming the territory in question was bound to show a definite line bounding it. Sundry facts were also considered and adjudged to be sufficient to raise a presumption of the annexation, and to determine the existence and location of such a boundary line.

² Barnes v. Barnes, 6 Vt. 388. In Sherwin v. Bugbee, 16 Vt. 439, it was said:—"It is now well settled in this State, notwithstanding the decisions reported to the contrary, that the mere fact of a school district maintaining its existence and operation for a great number of years, say fifteen, is sufficient evidence of its regular organization." And in Bassett v. Porter, 4 Cush. 487, the court said:—"It was by no means necessary to produce a record of the layout of the district or any direct and positive evidence of such layout;

§ 1358. **District school boards.**—Trustees composing a district school board are chosen from the residents of the district, and are elected by a majority of the electors of the district.¹ They are required before entering upon the duties of their office to subscribe to and make an oath pledging themselves to the faithful performance of their duty. A verbal oath was held not to be sufficient.² They have the management and control of the schools within their district, subject, of course, to the rules and regulations prescribed by the State board of education; and in the discharge of their duty they are allowed a large discretion, so long as they act within the provisions of statute. A majority of the board is the govern-

the fact that such a district had existed, had been known and recognized and had acted as such in all respects, would be ample evidence from which a jury might well infer or presume that it had a legal origin, though no direct or positive evidence of its origin could be produced. In truth the simple fact of the existence in such a town as Taunton of a school district known and acting as such for many years would lead the mind almost unavoidably and irresistibly to the conclusion that it must have had a legal origin. The longer its existence could be shown the stronger would be the presumption that it was originally duly established and that the direct evidence of its existence had been lost by time or accident. That it would be perfectly competent and proper for the jury to make such presumption there can be no doubt. Such presumption would be warranted by one of the most familiar and well-settled principles of the law of evidence. It is a matter of every day's practice that a long-continued possession furnishes ground of presumption that such possession was rightfully commenced and thus a legal title is established to land, or to an easement upon land, though no grant or deed is shown,

and no positive evidence of such grant or deed is introduced." See, also, *Bow v. Allentown*, 34 N. H. 351; *Dillingham v. Snow*, 5 Mass. 547. The question whether a *de facto* school district is legally organized and existing cannot be tried on *quo warranto* proceedings against persons claiming to be its officers. *State v. North*, 42 Conn. 89.

¹In Kansas women are considered electors, and have a right to vote (*Wheeler v. Brady*, 15 Kan. 26), but have no right to vote for State or county superintendents. *Winans v. Williams*, 5 Kan. 227. And in New Jersey aliens are prohibited from voting by the laws of 1851. *State v. Deshler*, 25 N. J. Law, 177; *Crawford v. Wilson*, 4 Barb. 504; *Woodcock v. Bolster*, 35 Vt. 632; *School Dist. v. Town (Vt.)*, 22 Atl. Rep. 570; *State v. Hutchins (Neb.)*, 50 N. W. Rep. 165; *State v. Wright*, 8 Blackf. (Ind.) 65.

²The provisions of Mansfield's Digest of Arkansas, section 6206, as amended by the act of Arkansas, April 4, 1877, requiring school directors, in order to qualify, to subscribe an oath of office and file it with the clerk, is mandatory, and a verbal oath is not sufficient. *School Dist. v. Bennett* (1890), 52 Ark. 511; s. c., 13 S. W. Rep. 132.

ing power.¹ It is their duty to provide school-houses; see that they are properly equipped with teachers and text-books, and located in suitable positions, and to prescribe such rules and regulations as may be incidental and necessary to the local management of the same. They will not be enjoined in the exercise of their discretion in selecting a site for a school building even if their action appears to be unwise and ill-advised.² But under certain statutes where it has been held that they could not purchase property they have been allowed to lease a site temporarily;³ but the method by which they may acquire real estate is usually prescribed by statute.⁴ They may also prescribe the hours of tuition, regulate the conduct of the pupils and similar details.⁵

¹ In *Hanover School &c. v. Gant*, 125 Ind. 557; s. c., 25 N. E. Rep. 872, it was held that where two boards of trustees acted in conjunction a majority of the same had the ruling voice.

² *Witherop v. Titusville School Board*, 7 Pa. Co. Ct. Rep. 45. Indiana Revised Statutes, section 4460, in its fifth clause confers the broadest powers on boards of school commissioners in cities of more than thirty thousand inhabitants, limited only by the wants of the schools, in the exercise of a reasonable discretion; and the eighth clause, instead of imposing limitations, enlarges the powers. Such a board therefore may contract for the erection of a school-house, and may agree to pay partly in cash and partly on time, and may give its promissory notes for the deferred payments. *Fatout v. Indianapolis School Comm'rs*, 102 Ind. 223. A school trustee may for good cause discontinue a school in his township; and where it appears that there are other schools being taught therein which the pupils can conveniently attend, and that the average daily attendance at the school in question during the last term was but four pupils, the number not being reduced by sickness or other providential

cause, no abuse of the trustee's discretion is shown. *Tufts v. State*, 119 Ind. 232; s. c., 21 N. E. Rep. 892.

³ *Millard v. Education Board*, 19 Ill. App. 48.

⁴ Under Revised Statutes of Indiana, section 4517, providing that, whenever a township trustee shall consider it necessary to purchase real estate on which to build a school-house, such trustee may file a petition in the circuit court asking for the appointment of appraisers, etc., the location of school-houses, and the time when such real estate shall be acquired, are in the discretion of such trustees. *Braden v. McNutt*, 114 Ind. 214; s. c., 16 N. E. Rep. 170.

⁵ *Starr & Curtis' Statutes of Illinois*, chapter 122, paragraph 83, page 2250, empowers the board of education to establish schools of different grades and make regulations for the admission of pupils into the same, to lay off and divide the district into subdistricts, and to apportion pupils to the several schools. They may refuse to admit the children of parents living in a subdistrict provided with a proper school to another school within whose territory they have been sent to board, but whose rooms are already crowded beyond their ca-

§ 1359. Meetings of district school boards.—The district board is called together for special or general meetings. The general meetings are at stated intervals, and it is understood that all matters pertaining to the management and government of the schools are subject to be considered at such meetings. In some cases no regular time is fixed for the holding of such meeting, and when it is found necessary to assemble the board for a special meeting, the notice calling such meeting must state the purpose and object thereof. This question has been considered in many cases turning upon the sufficiency of the notice required and the manner of communicating the same, but it is sufficient to say that the notice must clearly state the purpose and object of the meeting.¹

§ 1360. Prescribing text-books — Rescission of resolution.—The school law of Ohio provided for a board of education for each district or city, and these boards were required to hold regular meetings every two weeks, and were empowered to hold such special meetings as they might deem

capacity. *People v. Board of Education*, 26 Ill. App. 476. The language of the Illinois Supreme Court in *Chase v. Stevenson*, 71 Ill. 385, that "if the school-house was too small it would have been proper for the directors to have enlarged the building," and Revised Statutes (ch. 122, sec. 119 *et seq.*), making attendance at school for twelve weeks in the year compulsory, do not deprive the directors of the power to exclude children temporarily from a school on the ground of want of room. *People v. McFall*, 26 Ill. App. 319.

¹ Under a call for a school district meeting "for the purpose of obtaining information" on a certain subject, a committee cannot be appointed at the meeting with power to employ counsel to institute legal proceedings at the expense of the district. This is not embraced in the call. *Wright v. North School District*, 53 Conn. 576. Notices of school district meeting posted, one on the school-house, another on a building formerly used

as a grain building, and a third on a board fastened in or against a wall facing the road, were held to be posted in "public places." *Seabury v. Howland*, 15 R. I. 446; s. c., 8 Atl. Rep. 341. The official certificate of the director of a school district that notice of a certain special school meeting was given by posting up notices, which certificate was received in evidence under a stipulation in which it was recited that such stipulation was for the purpose of using the same as testimony to save taking depositions, was held to be evidence of the due publication of the notice of such meeting. *State v. School District No. 7*, 21 Neb. 723; s. c., 33 N. W. Rep. 266. Act of Illinois of 1889, page 296, article 5, section 19, does not invalidate official actions taken by board of directors at a meeting at which all of the directors are present, though such a meeting is not a regular one nor one specially called in the statutory manner. *Lawrence v. Trainer*, 136 Ill. 474; s. c., 27 N. E. Rep. 197.

necessary. The statute also provided that "each board of education shall determine the studies to be pursued and the text-books to be used in the schools under their control, and no text-book shall be changed within three years after its adoption without the consent of three-fourths of the members of the board of education given at a regular meeting. The board at a regular meeting accepted a proposition to furnish different text-books from those then in use, and adjourned without any motion to reconsider. At a meeting held two weeks later it was voted by a bare majority to reconsider the vote taken at the previous meeting. But the court held that this action was a nullity. "When the action of the board was consummated [at the first meeting]," said the court, "its power over the subject was exhausted for the period of three years from that date, unless the text-book so adopted should be changed within that time by the consent of three-fourths of the members of the board, given at a regular meeting thereof. The three years' limitation begins to run from the date of the official adoption of a text-book, and not from the time such book is introduced and brought into actual use in the schools."¹ But an opposite conclusion was reached in Nevada under a statute containing slightly different provisions. In this case the board had power "to prescribe and cause to be adopted a uniform series of text-books," with a qualification that they should not be changed oftener than once in four years. The board had express authority to do at a special session any act that it might do at a regular session. The Supreme Court of Nebraska decided that the board might, after it had passed a resolution prescribing a certain series of text-books, reconsider its action and rescind such resolution at any time before the adoption of such books by the different school districts.² And, independent of statutory provisions, it would not be competent to rescind at one meeting a resolution taken at a previous meeting where vested

¹ *State v. Board of Education*, 35 Ohio St. 368.

² *State v. Board of Education*, 18 Nev. 173. Referring to the Ohio case cited in the preceding note the court said:—"There is an important difference between the Ohio statute and ours. The reason why the Ohio

court said the board could not reconsider its former vote or adoption was because the statute prohibited further action for three years after . . . the time of adoption. There is no semblance of such prohibition in ours. Here text-books cannot be changed oftener than once in four

rights have been acquired under the first vote; as, for instance, where the publishers of the book adopted and the patrons of the school had acted in reliance upon the rescinded resolution in the sale and purchase of books.¹

§ 1361. Power of board of school trustees to contract.—

A board of school trustees have power to contract for things within the scope and contemplation of their authority and power. Such contracts must be incidental and necessary to the ordinary management of the schools, and as a rule must be the result of a resolution of the board authorizing the making of such contract; but the board may delegate to one of its members the power to make a contract, in which case the limitations of his powers must be clearly defined and he must follow them. In many instances this power is regulated by statute;² but where the trustees receive goods for the benefit

years. There they could not be changed within three years after their *adoption*, and the action of the board alone constituted an adoption. Under our law it is the board's duty to *prescribe* and *cause to be adopted* a text-book, etc. . . . Before the reconsideration the board did nothing furthering their adoption, which must be done by the districts, and not by the board. . . . The different districts must *adopt* the books *prescribed* by the board. But if before they are adopted the board concludes that it has made an unwise prescription, we know of nothing in the law forbidding a reconsideration. . . . By prescribing a text-book simply the board's duties are only half done. It must also see that the prescribed book is adopted, and thereafter for four years it cannot be changed."

¹ *Jones v. Board of Education*, 88 Mich. 371. In that case a change of text-books was prohibited except under certain rules, which were not complied with, and the court declined to express an opinion as to

whether the reconsideration could have been upheld if the publishers and patrons had acquired no rights in the *interim*.

² Under Revised Statutes of Indiana, 1881, sections 6006, 6007, and Acts of 1883, page 114, regulating the powers of school trustees to contract debts, a school trustee cannot, without an order from the county commissioners, bind the school township by a contract for the erection of a school-house when the township is indebted to an amount exceeding the money in the hands of the trustee and that to be raised by the tax levy for the year. *Middleton v. Greeson*, 106 Ind. 18; *Roseboom v. Jefferson School Tp.*, 122 Ind. 377; s. c., 23 N. E. Rep. 796. A contract made by two of three directors of a school district at a meeting held at a time different from the time fixed for regular meetings, and of which the third director had no notice, is not binding on the district. *School Dist. No. 42 v. Bennett*, 52 Ark. 511; s. c., 13 S. W. Rep. 132.

of the district and use the same, an implied contract will arise to pay a reasonable price for them. In one instance the court said:—"If supplies are received and used for the benefit of the district under such circumstances and for such length of time as to raise the presumption that it was with the common consent of the district, it will be bound to pay for them."¹ But one who contracts with and renders services for a *de facto* school board, which is not *de jure*, while the *de jure* officers are acting as such and performing the duties of their office, cannot recover from the school district the value of such services.² Where a prudential committee *de facto*, not legally elected but acting in good faith as such, furnished labor and material and board for a teacher, and the district stood by in silence and availed itself of the benefit, the court ruled that there was an implied promise on the part of the district to pay.³ Contracts may be ratified by the board of trustees either by special resolution or by acquiescence.⁴

¹ *Andrews v. School Dist. No. 4*, 37 Minn. 96; s. c., 33 N. W. Rep. 217.

² *White v. School Dist. (Pa.)*, 8 Atl. Rep. 443.

³ *Rowell v. School Dist. (Vt.)*, 10 Atl. Rep. 754. See, also, on the general subject of contracts, *O'Neil v. Battle*, 15 N. Y. Supl. 818; *Dolan v. Joint School Dist. &c. (Wis.)*, 49 N. W. Rep. 960; *Kittinger v. Monroe School Tp. (Ind. App.)*, 29 N. E. Rep. 931; *Hull v. Independent School Dist. (Iowa)*, 48 N. W. Rep. 82; *Sullivan v. School Dist. No. 39*, 39 Kan. 347; s. c., 18 Pac. Rep. 287; *Litten v. Wright School Tp.*, 127 Ind. 81; s. c., 27 N. E. Rep. 329; *Weitz v. Independent District*, 79 Iowa, 423; s. c., 44 N. W. Rep. 696; *Black v. Cornell*, 30 Mo. App. 641; *Creager v. Wright School Dist.*, 62 Mich. 101; s. c., 28 N. W. Rep. 794; *State v. Clark (N. J., 1890)*, 19 Atl. Rep. 462; *Andrews v. School Dist.*, 37 Minn. 96; s. c., 33 N. W. Rep. 217; *Dubuque &c. College v. Dubuque*, 18 Iowa, 555; *Huse v. Lowell*, 10 Allen, 149; *Flint River Dist. v. Kelley*, 55 Iowa, 568; *Kimball v.*

School Dist., 28 Vt. 8; *Shankland v. Phillips*, 3 Tenn. Ch. 556; *Kingman v. Thirteenth School Dist.*, 2 Cush. 426; *School Directors v. McBride*, 22 Pa. St. 215; *Garland v. Jackson*, 7 La. Ann. 68; *Weldman v. Board*, 7 N. Y. Supl. 309; *Barrett v. School Dist.*, 37 N. H. 445; *Hill v. School Dist.*, 17 Me. 316; *Middleton v. Greeson*, 106 Ind. 18; *State v. Tiedman*, 69 Mo. 515; *Board v. Chitwood*, 8 Ind. 504; *Ohio v. Treasurer*, 22 Ohio St. 144; *McCortle v. Bates*, 29 Ohio St. 419; *Hazen v. Leiche*, 47 Mich. 626; *McLain v. Snyder Tp. Sch. Dist.*, 12 Pa. St. 204; *Genesee Ind. Sch. Dist. v. McDonald*, 98 Pa. St. 444; *White v. School Dist. (Pa.)*, 8 Atl. Rep. 443; *School Dist. v. Bennett*, 52 Ark. 511; *Pennsylvania L. Rod Co. v. Cass Board &c.*, 20 West Va. 360; *Sanborn v. School Dist.*, 12 Minn. 17; *Wormley v. District Tp.*, 45 Iowa, 666; *School Dist. v. Bailey*, 12 Me. 254; *Wilson v. School Dist.*, 32 N. H. 118; *Harris v. School Dist.*, 28 N. H. (8 Fost.) 58.

⁴ *Norris v. School Dist.*, 12 Me.

§ 1362. Power to require parents to sign and return teacher's report.—The trustees of a school district were expressly authorized by statute (among other things) “to classify and grade the scholars” in the district, and “to make such rules and regulations as they may think needful for the government of the schools.” A rule was adopted to the effect that the teacher keep a record showing the attendance, deportment and standing in scholarship of each pupil, and that at the end of each month the teacher should make from such report a report card and send the same by each pupil to his parent or guardian; the rule further requiring each pupil within three days to return to the teacher this report card, signed by his parent or guardian, and on failure to do so he was to be sent home to get it signed. The parents of a pupil refused to sign the card, and the enforcement of the rule had the effect of excluding him from the school. Upon *mandamus* to compel the trustees to reinstate him it was contended that the rule was unreasonable and did not concern the education of the pupil or the discipline of the school. But the court took a different view, and upheld the rule upon the ground that in order to classify and grade the scholars it was important to know the progress made by each pupil, and that there was probably no better manner of determining the proficiency of the students than by a correct system of marking by the teachers on their daily recitations.¹

(3 Fairf.) 293; Everts v. District Tp., 77 Iowa, 37; Dubuque &c. College v. Dubuque, 13 Iowa, 555; Rowell v. Tunbridge School Dist., 59 Vt. 658; Trustees v. Trustees, 81 Ill. 470; Rowell v. School Dist., 59 Vt. 658; s. c., 10 Atl. Rep. 754.

¹ Bourne v. State (Neb., 1892), 52 N. W. Rep. 710. Touching that provision of the rule requiring the report to be signed and returned by the parent the court remarked that “by this method the parent is not only informed of the standing of his child, but the regularity of his attendance.” Several cases were distinguished:—State v. Board of Edu-

cation, 63 Wis. 234, where a pupil was suspended for refusing to comply with a regulation of the school to the effect that each scholar when returning to school after recess should bring a stick of wood for the fire. It was decided that the regulation was invalid. Holman v. School Trustees, 77 Mich. 605; s. c., 43 N. W. Rep. 997, where it was held that a rule adopted by the school board, which authorized the suspension of a pupil from school for failure to pay for or replace a window pane broken by him, was without authority and void. To the same effect is Perkins v. School Dist., 56 Iowa, 476;

§ 1363. Fiduciary capacity.— The office of trustee does not differ in its obligation from that of other trustees in the application of the doctrine that a trustee shall not benefit by his trust, and shall have an eye single to the interests intrusted to his care. The court will watch with the closest scrutiny any attempt on his part to make a profit out of his trust, and will enjoin any such action; for instance, where a single director held a legal title to a portion of a piece of property, and two others held equitable interests in it, they were enjoined from voting at a meeting to purchase the property. It was immaterial, the court said, that the acts were done in good faith.¹ So also an agreement by a board of directors of an independent school district to employ one of the directors as local superintendent of construction of a school building, and to pay him for such services, is void, and its performance may be restrained by a tax-payer without showing actual fraud.²

§ 1364. Limitations of power.— School trustees can only act within the powers prescribed by statute, and the liberty of action of executive officers of private corporations is not accorded to such trustees. They are required to act as a board in all matters of importance. Their action must be duly recorded and strictly complied with. They may, however, delegate members of their board to act for them.³ Where district

s. c., 9 N. W. Rep. 356. In *State v. School Dist.*, 31 Neb. 552, it was held that while the school trustees of a high school have the power to prescribe what branches shall be taught and what text-books shall be used, the parent has the right to decide what particular branch of studies of those prescribed to be taught shall be pursued by his child, and if the selection is reasonable it must be respected by the board.

¹Appeal of Witner (Pa.), 15 Atl. Rep. 428.

²Weitz v. Ind. Dist., 78 Iowa, 37; s. c., 42 N. W. Rep. 577. But the right of the plaintiff to compensation could not be resisted on the ground that the committee of which he was a

member stood in the relation of public officers to the district, and could not claim compensation for the discharge of an official duty. *McCaffrey v. School Dist.*, 74 Wis. 100; s. c., 42 N. W. Rep. 103.

³The duties devolved upon the members of the school district board or upon the moderator or director by Compiled Statutes of Nebraska, chapter 79, section 8, can only be performed by those two officers acting in conjunction. Any attempt on the part of either of them to perform such duties alone, and without the joint action of the other, is ineffectual and void. *State v. School Dist.*, 22 Neb. 48; s. c., 33 N. W. Rep. 480. So, also, Revised Statutes of Indiana of 1881,

trustees, however, act beyond their authority, such acts may be ratified by the tax-payers, either by actual vote of electors authorized to settle a disputed claim,¹ or by acquiescence; and it was held that a finding will not be disturbed after a long period of time, and the action of the board so long acquiesced in would be sustained.²

§ 1365. Personal liability of directors.—The officers and trustees are required to act in strict conformity to the provisions of statute, and when delegated by the board of trustees to perform any particular duty are given little discretion, and are required to act in accordance with their instructions; as where one was required to collect moneys belonging to the trustees and pay them to a certain officer, or to invest them in a certain manner, he will be required to do so; but his liability will not extend to a case where he relied upon the instructions of the board as he had a right to do, and loss accrued.³ But where the treasurer released a mortgage due to a school fund without the order of the board of trustees, he was held liable.⁴ So, also, where money was paid out of the special school fund, and should have been paid out of the general school fund. As a general rule his bond will not be liable un-

section 4444, which provides that trustees of school townships shall take charge of the educational affairs thereof, and shall employ teachers, provide "houses, furniture, apparatus and other articles and educational appliances necessary for the thorough organization and efficient management of said schools," does not authorize a trustee to purchase textbooks for the use of the pupils individually. *Honey Creek School Tp. v. Barnes*, 119 Ind. 213; s. c., 21 N. E. Rep. 747; *Andrews v. School Dist.*, 37 Minn. 96; s. c., 33 N. W. Rep. 217; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; s. c., 16 N. E. Rep. 511; *Shakespear v. Smith*, 77 Cal. 638; s. c., 20 Pac. Rep. 294; *School Dist. v. Roach*, 43 Minn. 495; s. c., 45 N. W. Rep. 1097; *Cross v. School Directors*, 24 Ill. App. 191.

¹ *Everetts v. Dist. Tp. of Rose Grove*, 77 Iowa, 37; s. c., 41 N. W. Rep. 478.

² *School Dist. No. 3 v. Township of Riverside*, 67 Mich. 404; s. c., 34 N. W. Rep. 886.

³ *State v. May* 22 Ark. 445; *Moore v. Fassenbeck*, 88 Ill. 422; *Board &c. v. Baker*, 34 Ill. App. 620; *Longan v. Taylor*, 31 Ill. App. 263, affirmed in 130 Ill. 412; s. c., 22 N. E. Rep. 745; *People v. Yeazel*, 84 Ill. 539; *Adams v. State*, 82 Ill. 132.

⁴ *McHenry v. School Trustees*, 68 Ill. 140; *Tappan v. People*, 67 Ill. 339; *Lovington v. School Trustees*, 99 Ill. 564; *Boone v. People*, 4 Ill. App. 231; *Humiston v. School Trustees*, 7 Ill. App. 122; *Board &c. v. Mesenheimer*, 78 Ill. 22; *Trustees v. Shepherd (Ill.)*, 28 N. E. Rep. 1073.

less a gross abuse of authority can be shown;¹ but where the statute imposes a duty which the trustee fails to perform, his bond will be liable.² Where, also, it is their duty to require a bond as security for the payment by the contractors for labor and materials furnished, and the school directors enter into a contract for building a school-house without taking such bond from the contractor, the officers of the board become personally liable to material-men and laborers, but they are entitled to an action for the contract price against the contractor when they have anything that may be due to the contractor on the building.³ But the trustees are not liable for the negligent act of servants employed by them, where they have exercised due diligence in procuring such servants.

§ 1366. Meetings of district electors — Elections.— The district school board, as heretofore recited, have power to act in all matters relating to the management and government of the schools; but it is usually the provision of statute that

¹ Board &c. v. Baker, 24 Ill. App. 231; Finney v. State, 126 Ind. 577; Mullikin v. State, 7 Blackf. (Ind.) 77; Lathrop v. State, 6 Blackf. (Ind.) 502; Tuley v. State, 1 Ind. 500; State v. Julian, 93 Ind. 292; Hadley v. State, 66 Ind. 271; Bluff Creek v. Hardenbrook, 40 Iowa, 130; Parish School v. Packwood, 42 La. Ann. 468; s. c., 7 So. Rep. 537; School Dist. v. Randall, 7 Cush. 478; Allen v. Metcalf, 17 Pick. 208.

² School Dist. v. Deshon, 51 Me. 454; School Dist. v. Tebbetts, 67 Me. 239; People v. Wright, 34 Mich. 371; School Dist. v. Thelander, 31 Minn. 333; Soule v. Thelander, 31 Minn. 227. Under the Code of Civil Procedure of New York, sections 1927, 1929, 1931, providing that trustees of school districts shall be individually liable for judgments recovered against them on contracts made by them in their official capacity, a judgment so recovered may be collected from their individual property, and a writ of *mandamus* will not be

granted to enforce the payment of such a judgment out of funds belonging to a school district in the hands of its trustees. People v. Abbott, 107 N. Y. 225; s. c., 13 N. E. Rep. 779.

³ Wells v. Board of Education, 78 Mich. 260; s. c., 44 N. W. Rep. 267. Session Laws of Michigan, 1883, act 94, provides, among other things, that school trustees, before entering upon a contract for the erection of any building for school purposes, shall first exact, in addition to the bond for the performance of the work, a bond conditioned for the payment by the contractor, as the same shall become due, of all indebtedness which may accrue to any person on account of labor or material furnished in the erection of such buildings. It was held that, although the statute requires that before accepting the bond the trustee shall first fix the amount in which it shall be given, and pass upon the sufficiency of the sureties, their functions in the matter are ministerial; but for failure to

where any matter of importance is to be acted upon it shall be submitted to a vote of the electors of the district; as, for instance, change of boundaries, annexation or separation of a district, levying of a tax for school purposes, the building of a school-house or the change of location thereof, or any extraordinary or unusual expense which either materially affects the residents of the districts or calls for an assessment upon them. Such election is called upon a petition¹ by a certain number of the freeholders of a district; in some instances addressed to the county court; in others to the county superintendent or other officer designated, requesting that a town meeting be called; the same being approved, notice is duly given by advertisement or otherwise as prescribed by statute.²

take such bond the trustees were liable in damages at the suit of a material-man injured thereby. *Owen v. Hill*, 67 Mich. 43; s. c., 34 N. W. Rep. 649.

¹ Under the General Laws of New Hampshire, chapter 88, section 6, providing that if ten voters of a school district are aggrieved by the location of a school-house by the district or school committee they may apply by petition to the county commissioners, who shall hear and determine the location thereof, the jurisdiction of the commissioners extends to towns in which the district system has been abolished, as the towns, under Laws 1870, chapter 8, had power to abolish the same at the time such statute was enacted. *Adams v. State* (N. H.), 18 Atl. Rep. 321; *State v. Compton*, 28 Neb. 485; s. c., 44 N. W. Rep. 660. Under Revised Statutes of Missouri, 1879, section 7023, providing for changes in the lines of old and the formation of new school districts, the petition and notice for the reorganization of the districts of a town must each specify the exact changes proposed in the boundary lines. *School Dist. v. School Dist.*, 94 Mo. 612; s. c., 7 S.

W. Rep. 285; *Carrico v. People*, 123 Ill. 198; s. c., 14 N. E. Rep. 66; *City of Lynn v. County Commissioners*, 148 Mass. 148; *Dartmouth Sav. Bank v. School Dist.*, 6 Dak. 332; s. c., 43 N. W. Rep. 822.

² *Holland v. Davies*, 36 Ark. 446; *Wilson v. Watersville School Dist.*, 44 Conn. 157; *Wright v. North School Dist.*, 53 Conn. 576; *Bartlett v. Kingsley*, 15 Conn. 327; *School Dist. v. Blakslee*, 13 Conn. 227; *Merritt v. Farris*, 22 Ill. App. 242; *Aikman v. School Dist.*, 27 Kan. 129; *Hazen v. Lerche*, 47 Mich. 626; *School Dist. v. Jennings*, 10 Ill. App. 643; *Ballard v. Davis*, 31 Miss. 533; *Downing v. Ruger*, 21 Wend. 178; *School Dist. v. Bennett*, 52 Ark. 511; *Perkins v. Crocker*, 109 Mass. 128; *Little v. Merrill*, 10 Pick. 543; *Perry v. Dover*, 12 Pick. 206; *George v. Mendon*, 6 Met. 497; *Alden v. Rounsville*, 7 Met. 218; *Kingsbury v. School Dist.*, 12 Met. 99; *Stone v. School Dist.*, 8 Cush. 592; *School Dist. v. Atherton*, 12 Met. 105; *Hayward v. Thirteenth School Dist.*, 2 Cush. 419; *Holbrook v. Faulkner*, 55 N. H. 311; *Rideout v. School Dist.*, 1 Allen, 232; *School Dist. v. Lord*, 44 Me. 374; *Soper v. School Dist.*, 28 Me. 193; *Fletcher v. Lincoln-*

Such notice must fully state the purpose of the meeting, as, for instance, that the same is for the purpose of appropriating money to build a school-house or to pay a debt on behalf of the school;¹ and the failure to comply with the requirements of the notice cannot be cured by the consent of the majority of the citizens.² At such meeting a majority vote governs, but this does not mean a majority of the whole of the voters in the district, but a majority of those voting.³ This vote is certified to by the district clerk and becomes operative thereafter.⁴

ville, 20 Me. 439; *Moor v. Newfield*, 4 Me. 44; *Leavitt v. Eastman*, 77 Me. 117; *Passage v. School Insp.*, 19 Mich. 330; *Andress v. School Insp.*, 19 Mich. 332; *Sturm v. School Dist.*, 45 Minn. 88; *State v. St. Anthony*, 10 Minn. 433; *People v. Peters*, 4 Neb. 254; *State v. School Dist.*, 21 Neb. 725; s. c., 33 N. W. Rep. 266; *Andover v. Carr*, 55 N. H. 452; *Dennison v. School Dist.*, 17 N. H. 492; *Chapin v. School Dist.*, 30 N. H. 25; *Harris v. School Dist.*, 28 N. H. 58; *Giles v. School Dist.*, 31 N. H. 304; *Weare v. Sawyer*, 44 N. H. 198; *Pickering v. De Rochemont (N. H.)*, 23 Atl. Rep. 88; *State v. Hurff*, 38 N. J. Law, 310; *State v. School Tr.*, 43 N. J. Law, 358; *State v. Browning*, 28 N. J. Law, 556; *Ring v. Grout*, 7 Wend. 341; *Marchant v. Langworthy*, 6 Hill, 646; *People v. Board &c.*, 1 N. Y. Supl. 593; *Clearfield Ind. School Dist.*, 79 Pa. St. 419; *Howland v. School Dist.*, 15 R. I. 184; s. c., 8 Atl. Rep. 337; *Seabury v. Howland*, 15 R. I. 446; s. c., 8 Atl. Rep. 341; *Holt's Appeal*, 5 R. I. 603; *Sherwin v. Bugbee*, 17 Vt. 337; *Bealey v. Dickenson*, 48 Vt. 599; *Mason v. School Dist.*, 20 Vt. 487; *Hunt v. School Dist.*, 14 Vt. 300; *Ovitt v. Chase*, 37 Vt. 196; *Weeks v. Batchelder*, 41 Vt. 317.

¹ *People v. Board of Education*, 1 N. Y. Supl. 593; *Witherop v. Titus-*

ville School Board, 7 Pa. Co. Ct. Rep. 451.

² *Elder v. Territory*, 3 Wash. T. 438; *Am. Dig.* 1888, p. 1227, sec. 7.

³ *Gentle v. Board &c.*, 73 Mich. 40; s. c., 40 N. W. Rep. 928; *Smith v. Proctor*, 6 N. Y. Supl. 212; s. c., 53 Hun, 143; *State v. Echols*, 41 Kan. 1; *Briggs v. Borden*, 71 Mich. 87; s. c., 38 N. W. Rep. 712; *Point Pleasant Land Co. v. School District*, 47 N. J. Law, 235.

⁴ *Appeal of Luburg (Pa.)*, 17 Atl. Rep. 245; s. c., 23 W. N. C. 454; *Board of Education v. Roehr*, 23 Ill. App. 629; *Capital Bank v. School Dist. No. 85*, 6 Dak. 248; s. c., 42 N. W. Rep. 774; *Fitzpatrick v. Board of Trustees*, 87 Ky. 132; s. c., 7 S. W. Rep. 896; *State v. Hanson*, 20 Nev. 401; *Baldwin v. Nickerson (Wyo.)*, 19 Pac. Rep. 439; *State v. Vreeland*, 79 Iowa, 466; s. c., 44 N. W. Rep. 709; *Perryman v. Bethune*, 89 Mo. 158; *People v. English (Ill. Sup.)*, 29 N. E. Rep. 678; *Irvin v. Gregory (Ga.)*, 13 S. E. Rep. 120; *State v. School Dist. (N. J.)*, 10 Atl. Rep. 191; *Graves v. Jasper School Tp. (So. Dak.)*, 50 N. W. Rep. 904; *Willard v. Pike*, 59 Vt. 202; s. c., 9 Atl. Rep. 907; *People v. Stone*, 78 Mich. 635; s. c., 44 N. W. Rep. 333; *Fractional School Dist. v. Boards of Inspectors*, 63 Mich. 611; *State v. Clark (N. J.)*, 19 Atl. Rep. 462.

§ 1367. **Term of school officer — Holding over.**— The term of every office is provided for by statutory enactment, but such enactment must not be in conflict with constitutional provision; as, for instance, where the term of office is limited by constitution to four years, a statute creating an office for five years was held to be void.¹ The appointee to a vacancy caused by death or otherwise holds only for the unexpired term;² but such a vacancy does not occur where an ineligible candidate is elected. The election in such a case is void, and the former incumbent holds over.³ Where an office is filled and acts *bona fide* performed by a person, though his appointment or election is in some respects irregular, the general rule is to consider such incumbent a *de facto* officer until the office is regularly filled.⁴

§ 1368. **School fund.**— The school fund is an endowment set apart for educational purposes. In many of the States it has been derived from federal grants of land; and increased by the operation of State statutes, whereby certain annual revenues go to this end. The laws regulating the care and custody of the fund are jealous of its preservation intact, and provide as a primary exaction that the principal shall never be decreased or diminished, and that only the revenue shall be used. In many of the States the donations of land made for the benefit of this fund are of vast extent and value, and form the basis of a permanent endowment for educational purposes.⁵ The distribution of the fund among the schools has occasioned some conflict, but the general rule is that it is regulated by the number of children in each dis-

¹ *State v. Harris*, 19 Nev. 222; *Pendleton v. Miller*, 82 Va. 390. Act of Mississippi of March 7, 1888, which provides for the election of county superintendents of education in part only of the counties of the State, does not thereby conflict with the constitution of Mississippi, article 8, section 1, requiring "a uniform system of public schools." *Wynn v. State* (Miss.), 7 So. Rep. 353.

² *People v. Stone*, 78 Mich. 635; s. c., 44 N. W. Rep. 333 (1890).

³ *Howard v. Carnett* (Ky.), 1 S. W. Rep. 1.

⁴ *School Dist. v. Town Treasurers &c.*, 61 Mich. 373; s. c., 28 N. W. Rep. 132; *People v. Board of Education*, 1 N. Y. Supl. 743; *Cleveland v. Amy* (Mich.), 50 N. W. Rep. 293; *Pettigrew v. Bell*, 34 S. C. 104; s. c., 12 S. E. Rep. 1023; *Bartlett v. Sayer*, 12 N. Y. Supl. 170; *State v. Horton*, 19 Nev. 199; *State v. Lane* (R. I.), 18 Atl. Rep. 1035.

⁵ *Board of Trustees v. Thomas* (Ky.), 15 S. W. Rep. 670.

trict.¹ The treasurer of the State is the custodian of the fund, and has the duty of investing the same. The statute usually limits such investments to a certain class of securities. The holding and handling of the fund is regarded as a trust, and regulated by rules of the court of equity relating thereto.²

§ 1369. The same subject continued — **Mandamus to State comptroller.**—In Connecticut it is made the duty of the State comptroller by general statute to distribute annually among the several towns a certain sum for every person of school age, together with a proportionate share of the income of the school fund. Upon application for a writ of *mandamus* to compel him to perform this duty, it was urged in opposition that the official action which the writ required him to perform was included in and was the exercise of the powers and duties vested and imposed upon him as an independent officer of the executive department by the constitution, which could not lawfully be enforced by writ of *mandamus*. The court said that if it was intended to assert that he could not be controlled by *mandamus* in the exercise of merely discretionary duties the objection was sound; but the fact that he derived his powers from the constitution rather than from the statutes was not a tenable defense. "It is the nature of the thing to be done," said Andrews, C. J., "by which the propriety or the impropriety of issuing a *mandamus* is to be determined, and not the office of the person to whom the writ is directed, nor the source from which he derives his power.

¹ School Dist. v. Twitchell, 63 N. H. 151. Property in school fund: Case 11; School Dist. No. 1 v. Town of v. Blood, 71 Iowa, 632; s. c., 33 N. Bridport (Vt.), 22 Atl. Rep. 570; W. Rep. 144. How money is drawn from the fund: State v. Bloom, 19 Towle v. Brown, 110 Ind. 599; s. c., 10 N. E. Rep. 628; School Dist. No. 1 Neb. 562; Goose River Bank v. Willard Lake School Tp. (N. D.), 44 N. v. Prentiss (N. H.), 19 Atl. Rep. 1090; W. Rep. 1002; *In re McGraw's Estate*, 111 N. Y. 66; State v. Board of County Yaggy v. Dist. Tp. of M. &c., 80 W. Rep. 1002; *In re McGraw's Estate*, 111 N. Y. 66; State v. Board of County Cook v. School Dist., 12 Colo. 453; Comm'rs, 17 Nev. 96; Montgomery County of Montgomery v. Auchley, County v. Auchley (Mo.), 15 S. W. 92 Mo. 126; s. c., 4 S. W. Rep. 425; Rep. 6; Board of Schools v. School Moiles v. Watson, 60 Mich. 415. District No. 1 (Wis.), 51 N. W. Rep.

² State v. Levi, 90 Ind. 77; Starkwell v. State, 101 Ind. 1; Edwards v. Trustees &c., 30 Ill. App. 528; Snodgrass v. Morris (Ind.), 24 N. E. Rep. 874; Merritt v. Merritt (Ark.), 16 S. W. Rep. 287; Porter v. State (Tex.), 14 S. W. Rep. 794.

Subject, possibly, to some exceptions, we think the law to be this: — That whenever any public officer, however humble, is intrusted with power, in the exercise of which he may use discretion in respect to such exercise, he cannot be controlled by *mandamus*; and that whenever any public officer, however high, is commanded by the constitution, or by any statute, to perform a ministerial act, the performance of such act may be compelled by *mandamus*.”¹ The court held that the constitutional duty of the comptroller “to adjust and settle all public accounts and demands except grants and orders of the General Assembly” imposed a ministerial duty in the case in hand, to enforce performance of which *mandamus* was the appropriate proceeding.²

§ 1370. School taxes.— As a general rule the schools are supported by a local school tax on the property holders of each school district. A State tax is also levied in some of the States for educational purposes. This is usually made in the

¹ State v. Staub (Conn. 1892), 23 Atl. Rep. 924, citing High on Extraordinary Remedies, §§ 24–34.

² State v. Staub, cited in the preceding note. “A ministerial duty, the performance of which in proper cases may be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.” Chief Justice Chase, in *Mississippi v. Johnson*, 4 Wall. 498. “A ministerial act is one which a person performs in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his judgment upon the propriety of the act being done.” *Insurance Co. v. Fyler*, 60 Conn. 448. . . . The meaning of the terms ‘adjust and settle’ can be better understood if one bear in mind that some accounts and demands are liquidated and that others are unliquidated. A liquidated account is

one the amount of which is agreed upon by the parties, or is fixed by operation of law. *Hargroves v. Cooke*, 15 Ga. 321; *Bull v. Bull*, 43 Conn. 469; *Warren v. Skinner*, 20 Conn. 562. The word ‘settle’ when applied to a liquidated account or demand means to pay it. *Pinkerton v. Bailey*, 8 Wend. 600; *Stilwell v. Coope*, 4 Denio, 225. The word ‘adjust’ when used in reference to a liquidated claim has the same meaning though perhaps not quite so clearly. The word ‘settle’ when applied to an unliquidated claim or demand means its mutual adjustment between the parties and an agreement upon the balance. *Baxter v. State*, 9 Wis. 38, 44. . . . We have no occasion to discuss unliquidated claims. It may well be that as to such claims the comptroller exercises a discretion. But when a claim is liquidated in the sense that its amount is fixed by operation of law, it is difficult to see how the comptroller can use any discretion in

general tax levy, but sometimes *per capita* on every male resident.¹

§ 1371. **School lands.**—The title to school lands is held by the State. It may also be taken by a district for the use of the State or school fund.² And the district trustees are proper parties to bring suit with reference thereto in the name of the State.³ As to sales of such lands the requirements are strict, and are made with a view to throwing around such sales every safeguard to prevent fraud. The usual requirement is that such sales must be made at auction to the highest bidder. Sales on contract, payments to be made from time to time, are not uncommon.⁴ The presumption is that a sale of school lands is regular.⁵ And title in the schools will not be affected by a judgment against trustees individually relating to school lands.⁶ Where it is deemed desirable or necessary by the board of trustees to locate a school on certain lands, condemnation proceedings may be had to acquire the same, and the question of location is in the discretion of the school trustees.⁷

respect to it. When the law fixes definitely the amount of any claim, and also fixes the manner and time of its payment and the person to whom it is due, and the claim is presented to the comptroller by that person, and at that time, he has in respect to it 'no discretion to exercise, no judgment to use, and no duty to perform,' but to draw his order in payment of it."

¹ As to levy of tax: *Bordeaux v. Meridian Land &c. Co.*, 67 Miss. 304; s. c., 7 So. Rep. 286; *Cowart v. Foxworth*, 67 Miss. 322; s. c., 7 So. Rep. 350; *State v. Clark* (N. J.), 19 Atl. Rep. 462; *People v. City of Bloomingdale*, 130 Ill. 406; *Lawrence v. Trainer*, 136 Ill. 474; s. c., 27 N. E. Rep. 197. Constitutionality of tax: *Macklin v. Trustees &c.* (Ky.), 11 S. W. Rep. 657. As to purposes for which tax may be levied: *Torrey v. Willard*, 8 N. Y. Supl. 392; s. c., 55 Hun, 78; *Fortman v. State* (Ind.) 10 N. E. Rep.

94; *School District No. 1 v. Wickersham*, 34 Mo. App. 337; *Griggs v. St. Croix Co.*, 27 Fed. Rep. 333; *Wilcox v. Township of Eagle*, 81 Mich. 271; s. c., 45 N. W. Rep. 987.

² *People v. Roche*, 124 Ill. 9; s. c., 14 N. E. Rep. 701.

³ *Widner v. State*, 49 Ark. 172; s. c., 4 S. W. Rep. 657; *School Dist. No. 10 v. Driver* (Ark.), 7 S. W. Rep. 387; *State v. Benton* (Neb.), 45 N. W. Rep. 794.

⁴ *McPheeters v. Wright*, 110 Ind. 519; s. c., 10 N. E. Rep. 634; *Barker v. Torrey*, 69 Tex. 7; s. c., 4 S. W. Rep. 646.

⁵ *McPheeters v. Wright*, 110 Ind. 519; s. c., 10 N. E. Rep. 634.

⁶ *Luckett v. Buckman* (Ky., 1890), 1 S. W. Rep. 391.

⁷ *Braden v. McNutt*, 114 Ind. 214; s. c., 16 N. E. Rep. 170; *Howland v. School Dist. No. 3*, 15 R. I. 184; s. c., 8 Atl. Rep. 337.

Foreclosure proceedings are had in the usual way, where default is made in payment of interest or instalment of principal, on mortgages or contracts of sale, due the school fund.¹

§ 1372. **School bonds.**—School bonds are obligations of indebtedness bearing interest, which are issued for the purpose of raising money to make permanent improvements or provide funds for school purposes. The usefulness of such a plan is manifest, for the reason that oftentimes in starting a school district, and undertaking the erection of the necessary school buildings, the burden would be too great on the tax-payers should the whole amount be required to be paid in one year. To avoid this a series of bonds are issued bearing interest and redeemable either at the end of a given period or certain amounts of the principal and interest each year, and to meet this charge an annual tax is levied which is not large enough to be a burden upon the people.²

¹ Board of Comm'rs v. State, 122 Ind. 333, where it was held that when a county has loaned out part of its school fund on a mortgage, and, on default of the mortgagor, paid the interest, and at the foreclosure sale of the mortgaged premises the property was bid in for account of the school fund, and at a subsequent sale more than enough was realized to pay the principal and interest, the county is entitled to be reimbursed for the interest paid. Clark v. State, 109 Ind. 388; s. c., 10 N. E. Rep. 125; State v. Graham, 21 Neb. 329; s. c., 32 N. W. Rep. 142, where it was held that the mortgagor was required to pay interest annually on mortgages to the school fund or purchase of school lands, and that a long discontinuance of such payment would raise a presumption of forfeiture. As regards notice and title and lease: Martin v. Brown, 62 Tex. 485; Anderson v. Prairie School Tp. (Ind.), 27 N. E. Rep. 439; Robinson v. Hague, 63 Iowa, 273; Peck v. Louisville &c. Ry.

Co., 101 Ind. 366; Delhi School Dist. v. Everett, 52 Mich. 314; Bres v. Louviere, 37 La. Ann. 736. Fraudulent conveyances: Pulliam v. Runnels County (Tex.), 15 S. W. Rep. 277. Administration of bequest: Myers v. School Trustees, 21 Ill. App. 223.

² St. Joseph School Board v. Gaylord, 86 Mo. 401; Rogers v. Trustees Graded School (Ky.), 13 S. W. Rep. 587. In order that such an issue may be valid a vote of the electors of the district to be charged must be had (State v. Benton, 29 Neb. 460; s. c., 45 N. W. Rep. 794); but where the law does not authorize the people of a school district to vote that bonds be issued for a specific purpose, such a vote does not make the bonds valid, even in the hands of innocent purchasers. Ashuelot Nat. Bank v. School Dist., 41 Fed. Rep. 514. So also, where the issue was for a purpose not authorized by statute, they are void. State v. County Comm'rs (Neb.), 48 N. W. Rep. 146; Burke v. Galveston County, 76 Tex. 267.

§ 1373. School teacher — Appointment — Contract — Removal.— The power to appoint school teachers is in the hands of the district school boards, subject to such rules and regulations as may be prescribed by the board of education, as to the qualification of teachers, term of office, compensation and contract of employment,¹ contract in writing and salary.² A teacher may be removed for cause independent of the terms of the contract of employment.³

¹ *Galesburg Ed. Board v. Arnold*, 112 Ill. 11. A majority vote of the district board is required for the appointment of a teacher and an entry on the minutes of the board to this effect. *Cleveland v. Amy*, 88 Mich. 374; s. c., 50 N. W. Rep. 293; *School District v. Mercer* (Pa.), 9 Atl. Rep. 64; *State v. Grosvenor*, 19 Neb. 494. The contract with the teacher is regulated by the rules of law concerning contracts of employment, excepting the clause that the same may be terminated by the board at any time. When this is the case no notice is necessary. *Dunavan v. Board of Education*, 47 Hun, 13; *Weidman v. Board of Education*, 7 N. Y. Supl. 309. When employment without authority, see *Skinner v. Bateman*, 96 N. C. 5; s. c., 1 S. E. Rep. 538.

² *Foult v. McCartney*, 42 Kan. 695; *Armstrong v. School Dist.*, 28 Mo. App. 169; *Holloway v. Ogden School Dist. No. 9*, 62 Mich. 153; *People v. Coffey*, 16 N. Y. Supl. 501; *School Town &c. v. Powner*, 126 Ind. 528; s. c., 26 N. E. Rep. 484; *Patterson v. City of Butler*, 88 Ga. 606; *Cobb v. School Dist.*, 63 Vt. 647; s. c., 21 Atl. Rep. 957; *Milford v. Ziegler* (Ind.), 27 N. E. Rep. 303; *Caviel v. Coleman*, 72 Tex. 550; *McGinness v. School Dist.*, 39 Minn. 499; *De Wolf v. Watterson*, 39 Hun, 111; *Lee v. School Dist.*, 71 Mich. 371; s. c., 38 N. W. Rep. 867. In an action for compensation by one employed by a director as superintendent, it is error to exclude evidence that the board of

trustees, which alone has authority to make a contract for such employment, knew of the services in that behalf and accepted them. *Davis v. School Dist.*, 81 Mich. 214; s. c., 45 N. W. Rep. 989. Collection of salary: *County of Caldwell v. Harbert*, 68 Tex. 321; s. c., 4 S. W. Rep. 607; *McCauley v. School Dist.* (Pa.), 19 Atl. Rep. 410; s. c., 25 W. N. C. 519. Where school is discontinued district relieved from payment of salary: *Goodyear v. School Dist.*, 17 Oregon, 517; *Gilroy v. School Dist.*, 17 Oregon, 522. Where school-house destroyed by fire: *School Dist. v. Crews*, 23 Ill. App. 367. Want of sufficient funds to pay does not avoid contract or the closing of a school: *Reedy v. School Dist.*, 30 Mo. App. 113. And legal holidays do not count against a teacher: *Holloway v. Ogden School Dist.*, 62 Mich. 153. Qualifications of teachers: *Hotz v. School Dist.*, 1 Colo. App. 40; s. c., 27 Pac. Rep. 15; *Goose River Bank v. Willow Lake School Tp.* (N. Dak.), 44 N. W. Rep. 1002; *Smith v. School Dist.*, 69 Mich. 589; s. c., 37 N. W. Rep. 567; *Devoe v. School Dist.*, 77 Mich. 610; s. c., 43 N. W. Rep. 1062. Under Minnesota constitution, article 7, section 8, providing that a woman shall be eligible to hold "any office pertaining solely to the management of schools," it was held that a woman could hold the office of county superintendent of schools. *State v. Gorton*, 33 Minn. 345.

³ Supervisors may be removed for "omission of duty," and a superin-

§ 1374. **Pupils.**—The children of resident parents of a school district are entitled to all the privileges and benefits of the public schools. And where a child's father has deserted it, and the mother is living in another district where she is unable to keep the child, but has found a home for the child in this district, the court decided that the child was entitled to the school privileges as if its parents were residents.¹ But the children of one district may attend the schools of another upon the payment of a tuition fee. This fee is usually fixed at the average cost to the district of each child attending the school.² The "legal school age" is under twenty-one years;³ but where a child has graduated from one department it is in-

tendent who has neglected his duty through intoxication, and without giving him a hearing. *People v. May*, 17 Ill. App. 361. So also in *Quigley v. Vaughn*, 17 Ill. App. 347, for immoral conduct. But in *Armstrong v. School Dist.*, 19 Mo. App. 462, it was held that the board of school directors could not remove a teacher for immoral conduct, the power being in the county commissioners. But no personal liability attaches to the trustees' acts in discharging a teacher unless malice can be clearly proven. *Adams v. Thomas* (Ky.), 12 S. W. Rep. 940. Misconduct: *School Dist. v. Maury* (Ark.), 14 S. W. Rep. 669; *Kennedy v. Board of Education*, 82 Cal. 483; *School Directors v. Ewington*, 26 Ill. App. 379. But a teacher is not discharged by abolishing the department in which he is engaged, or removing him to another and lower grade. *School Town of Milford v. Zeigler* (Ind.), 27 N. E. Rep. 303; *Kennedy v. Board of Education*, 82 Cal. 483. But in many States the board of trustees have power to discharge teachers without a hearing or alleging a cause. *Smartwood v. Walbridge*, 10 N. Y. Supl. 862; *McLellan v. St. Louis School Board*, 15 Mo. App. 362; *Peo-*

ple v. N. Y. City Board of Ed., 52 N. Y. Super. Ct. 520; *Hull v. Indep. Dist. &c.* (Iowa), 46 N. W. Rep. 82; 46 N. W. Rep. 1053.

¹ *State v. Thayer*, 74 Wis. 48; s. c., 41 N. W. Rep. 1014; *Yale v. West Middle Sch. Dist.*, 59 Conn. 489.

² *Binde v. Klinge*, 30 Mo. App. 285, where it was decided "that a minor who is neither an orphan nor an apprentice, and whose parents reside without the school district, is not entitled to attend school without payment of tuition fees, although having a home more or less permanent within the district." *Irvin v. Gregory* (Ga.), 13 S. E. Rep. 120. Referring to non-resident pupils it was said in the case last cited that such pupils cannot be received at a less rate per scholar than the inhabitants of the town pay by taxation for their children, nor can they be received at all to the exclusion of resident children. For meaning of "*pro rata* cost of tuition," see *State v. Hamilton* (Miss.), 10 So. Rep. 57. Admission on payment of tuition: *Rogers v. Trustees Graded Schools* (Ky.), 13 S. W. Rep. 587.

³ *Needham v. Wellesley*, 139 Mass. 372.

eligible to that department again.¹ Teachers have the power to prescribe rules and regulations for the government of the pupils within the school, and to preserve order and discipline;² but such regulations must be reasonable, and not reaching beyond the limits of the school.³ And a teacher may punish a pupil in a reasonable manner.⁴

§ 1375. Race question in schools.—The question as to a discrimination between children as to color has been a subject to which legislators and the courts have given much consideration. The theory that the schools are based upon the principle that they are free institutions and intended for the equal benefit of all of the people without regard to race or color has been the guiding motive of all of these discussions. In the earlier cases the tendency was to apply the rule strictly, leaning towards an effort to break down all barriers between the races, and not to permit any separation or grading of the schools; while the modern doctrine accepts the previous theory, but evades the question by holding that it is not a violation of the freedom of the school or the equality of the privileges thereof to classify the scholars according to a standard which shall be found expedient and necessary by those controlling the government of the schools. The Supreme Court of the United States,⁵ in reviewing the question in a case arising in Ohio, declared "that it worked no substantial inequality of school privileges between the children of the two classes in the locality of the parties; that equality of rights does not involve the necessity of having white and colored persons in the same school, any more than it does that of taking children

¹ *People v. Board of Education*, 4 N. Y. Supl. 102.

² *Deskins v. Gose*, 85 Mo. 485; s. c., 55 Am. Rep. 387.

³ A regulation that a scholar could not go to a social party was held void. *State v. Osborne*, 32 Mo. App. 536. Defacing school property: *Holman v. School T. &c.*, 77 Mich. 605; s. c., 43 N. W. Rep. 996. Insubordination: *State v. School Dist. (Neb.)*, 48 N. W. Rep. 393.

⁴ What is reasonable punishment

is a question of fact for the jury, and past offenses may be considered in inflicting the punishment, where they aggravate the present one, and show habitual disobedience. *Sheehan v. Sturgis*, 53 Conn. 481. A teacher has a right to use force in taking away a pistol from a pupil. *Metcalf v. State*, 21 Tex. 174. But where the teacher oversteps the limit of reasonable punishment, malice will be inferred. *Boyd v. State*, 88 Ala. 169.

⁵ *Hall v. De Cuir*, 95 U. S. 504.

of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that any classification which preserves substantially equal school privileges is not prohibited by either the State or federal constitution, nor would it contravene the provisions of either."¹

§ 1376. Bible in schools.—Some of the State statutes expressly provide that the school funds shall not be used for sectarian or religious purposes. And the constitutional provisions are uniform that taxation shall not be had for religious purposes. The courts in interpreting these provisions have uniformly maintained a strict rule. For instance, as regards the reading of the Bible in schools, a wide discussion has been had, and in some States it has been held unconstitutional to use the Bible at all in the school, whilst in others the reading of the text without comment has been permitted.²

¹ *State v. McCann*, 21 Ohio St. 198; *Irvin v. Gregory* (Ga.), 13 S. E. Rep. 120; *State v. Union District School Trustees*, 46 N. J. Law, 76; *Board of Education v. State of Ohio*, 45 Ohio, 555; s. c., 16 N. E. Rep. 373; *Tape v. Hurley*, 66 Cal. 473; *Halls Free School Trustees v. Horne*, 80 Va. 470; *Re Malone*, 21 S. C. 435; *Jacksonville v. Akers*, 11 Ill. App. 393; *Claybrook v. Owensboro*, 23 Fed. Rep. 634; *Knox v. Board &c.*, 45 Kan. 156; *Board &c. v. Linnon*, 26 Kan. 1; *People v. Board*, 101 Ill. 208; *Maddox v. Neal*, 45 Ark. 121; *Ward v. Flood*, 48 Cal. 36; *Wysinger v. Crookshank*, 82 Cal. 588; *Reid v. Town of Eatonton*, 80 Ga. 755; s. c., 6 S. E. Rep. 602; *People v. Quincy Board &c.*, 101 Ill. 308; *Chase v. Stephenson*, 71 Ill. 383; *Smith v. School Dist.*, 40 Iowa, 210; *Dove v. Ind. School Dist.*, 41 Iowa, 689; *Clark v. Board &c.*, 24 Iowa, 266; *People v. Board &c.*, 18 Mich. 400; *State v. Stoutmeyer*, 7 Nev. 342; *Stewart v. Southard*, 17 Ohio, 402; *Lane v. Baker*, 13 Ohio, 237; *Williams v. Directors &c.*, *Wright (Ohio)*, 579; *Commonwealth v. Williamson*, 10

Phila. (Pa.) 490; *Cory v. Carter*, 48 Ind. 327; *Bertonmeau v. Directors*, 3 Woods, 177; *County Court v. Robinson*, 27 Ark. 116; *People v. Easton*, 13 Abb. Pr. (N. S.) 164, 165; *Puitt v. Comm'rs*, 94 N. C. 709; *Van Camp v. Board &c.*, 9 Ohio St. 406; *Draper v. Cambridge*, 20 Ind. 268; *Dallas v. Fosdick*, 40 How. (N. Y.) Pr. 249; *State v. City of Cincinnati*, 19 Ohio, 178; *Lehew v. Brummel*, 103 Mo. 546; *Ellsberry v. Seay*, 83 Ala. 614; *McMillan v. School Comm'rs*, 107 N. C. 609; *People v. McFall*, 26 Ill. App. 319; *State v. Gray*, 93 Ind. 303; *State v. Grubb*, 85 Ind. 213; *Kame v. Commonwealth*, 101 Pa. St. 490; *Roberts v. Boston*, 5 Cush. 198.

² *State v. Dist. Board*, 76 Wis. 177, was a petition by a resident and taxpayer of a city for a writ of *mandamus* to compel the discontinuance of the practice of reading the Bible in the public schools therein, averring that the residents of the city who are taxed for the support of the schools are equally entitled to the benefits thereof, by having their children instructed therein according

§ 1377. **Actions and defenses.**—The school districts in their corporate capacity have the power to sue and defend suits brought against them, subject to a limitation in some States that one district cannot sue another, and limitations as to the times of bringing suit.¹ Claims against a school district are assignable,² but when suit is brought the parties to the record

to law; and that the reading complained of was contrary to the rights of conscience and in violation of law. The whole Bible, without exception, having been designated as a text-book for use in schools, and it being claimed by the school board that the whole contents thereof might lawfully be read in such school, if the teacher so elected, the Bible was to be regarded as a whole in determining whether such reading was sectarian instruction; and it was immaterial that the only portion thereof thus far read in such schools was not sectarian. The use of any version of the Bible as a text-book in the public schools and the stated reading thereof in such schools by the teacher without restriction, though unaccompanied by any comment, was held to have a tendency to inculcate sectarian ideas within the meaning of section 3, chapter 251, Wisconsin Laws of 1883; and was "sectarian instruction" within the meaning of section 3, article 10, constitution of Wisconsin. The reading of the Bible as a text-book in public schools may be "worship," and the school-house thereby become for the time being "a place of worship," within the meaning of section 18, article 1, of the constitution, and to such use of the school-house the tax-payers, who are compelled to aid in the erection and in the maintenance of the school, have a legal right to object. Such reading being religious instruction, the money drawn from the State treasury for the support of a school in which the Bible is read is for the benefit of a "religious seminary," within the meaning of said section. *Spiller v. Woburn*, 12 Allen, 127; *Board &c. v. Minor*, 23 Ohio St. 311; *State v. Dist. Board*, 76 Wis. 177; s. c., 44 N. W. Rep. 967; *Donahoe v. Richards*, 38 Me. 376; *McCormick v. Burt*, 95 Ill. 266. In the case of *County of Cook v. Industrial School*, 125 Ill. 540, it was decided that:—A school is sectarian and comes within constitutional provisions that public funds shall not be paid out in aid of any sectarian purpose, or in aid of any school, etc., controlled by any church, where such school is a corporation organized as an industrial school for girls, but does not lease or own any building, although its charter contemplates that it shall have a *situs*; or otherwise comply with the provisions of its charter, but places all girls nominally committed to it under the sole charge, care and control of two institutions controlled by a church, where they are taught, maintained and clothed by them alone, and in which institution the inmates, although not obliged to receive instruction in the Roman faith, are yet taught no other faith or creed; and in such a case a suit to recover for tuition and clothing furnished girls so placed cannot be maintained against the county. See, also, *State v. Hallock*, 16 Nev. 373.

¹ *School Dist. v. School Dist.*, 18 Mo. App. 266; *Parker v. Buckner*, 67 Tex. 20; s. c., 2 S. W. Rep. 746.

² *County of Caldwell v. Harbert*, 68 Tex. 321; s. c., 4 S. W. Rep. 607.

should also be changed.¹ The general rules of pleading apply,² and the parties to the action should be all the parties in interest.³ Appeals may be taken under some statutes from the action of the district board to the county and State superintendents, but the questions involved can usually be better considered by the courts of law on a writ of *mandamus* and *certiorari*;⁴ and the court of equity may also interfere by injunction.⁵

¹ *Lovering v. School Dist.*, 64 N. H. 102.

² *Moll v. School Dist.*, 23 Ill. App. 508; *County of Caldwell v. Harbert*, 68 Tex. 321; s. c., 4 S. W. Rep. 607; *Brown v. Town Board &c.*, 77 Wis. 27; s. c., 45 N. W. Rep. 678; *Jefferson School Tp. v. Letton*, 116 Ind. 467; *School Dist. v. Oxford*, 63 N. H. 277; *Trustees of Schools v. People*, 121 Ill. 552; s. c., 13 N. E. Rep. 526; *Western Pub. House v. Blackman* (S. Dak.), 51 N. W. Rep. 214.

³ *Burke v. Galveston County*, 76 Tex. 267; *Ind. School Dist. v. Gookin*, 72 Iowa, 387; s. c., 34 N. W. Rep. 174; *Ellsberry v. Seay*, 83 Ala. 614; s. c., 3 So. Rep. 804.

⁴ *In re Merrill*, 8 N. Y. Supl. 737; *Moode v. Board of County Comm'rs*, 43 Minn. 312; *People v. Board of Education*, 4 N. Y. Supl. 102; *Ind. School Dist. v. Gookin*, 72 Iowa, 387; s. c., 34 N. W. Rep. 174; *Newby v.*

Free, 72 Iowa, 379; s. c., 34 N. W. Rep. 168; *Parks v. Pleasant Grove School Dist.*, 65 Iowa, 209; *Merritt v. Merritt* (Ark.), 16 S. W. Rep. 287. *Mandamus*: *Culver v. Armstrong*, 77 Mich. 194; s. c., 43 N. W. Rep. 776. To compel apportionment of school funds: *State v. Grimshaw* (Mo.), 1 S. W. Rep. 363; *Maddox v. Neal*, 45 Ark. 121; s. c., 55 Am. Rep. 540. Formation of new districts: *Trustees of Schools v. People*, 121 Ill. 552; s. c., 13 N. E. Rep. 526. Assessors to make payments: *Phillips v. School Dist.*, 79 Mich. 170; s. c., 44 N. W. Rep. 429. But *mandamus* will not lie: *People v. Roche*, 124 Ill. 9; s. c., 14 N. E. Rep. 701; *Elder v. Ter. of Wash.*, 3 Wash. Ter. 438; s. c., 19 Pac. Rep. 29; *Watts v. McLean* (1890), 28 Ill. App. 537; *Hale v. Risley*, 69 Mich. 596; s. c., 37 N. W. Rep. 570.

⁵ *Briggs v. Borden*, 71 Mich. 87; s. c., 38 N. W. Rep. 712.

CHAPTER XXXV.

TAXATION.

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§ 1378. Distinction between "tax" and "assessment."

The subject of "local assessments" has been discussed elsewhere,¹ but it is proper to observe that such assessments, though laid under the taxing power, are not taxes in the technical sense of that term, and that they may be laid by some other standard than that of value if the legislature shall so prescribe, and there is no constitutional inhibition. The rule usually adopted and the equitable rule is apportionment by benefits.² It is an unsettled question as to whether the legislature may declare that no part of the expense of a local improvement for the public use shall be borne by a general tax. Unless there is some inhibiting constitutional provision the weight of authority is in favor of leaving the matter with the legislature.³ The equitable rule would seem to be the levying of local assessments to the extent of any special benefits received, any excess of cost being borne by the general treasury, on the ground of benefit to the municipality at large.⁴

§ 1379. Situs of taxable property.—The taxing power of a municipality does not extend beyond the geographical limits

¹ See Chapter XXVIII, *supra*.

² *Barnes v. Dyer*, 56 Vt. 769; *Hanscom v. Omaha*, 11 Neb. 37. See *Hare's American Constitutional Law*, pp. 286 *et seq.* A leading case on this subject is *People v. Brooklyn*, 4 N. Y. 419.

³ *Palmyra v. Morton*, 25 Mo. 593; *St. Louis v. Clemens*, 36 Mo. 467; *Eyerman v. Blaksley*, 78 Mo. 145;

Barber v. Comm'rs, 93 N. C. 143; *White v. People*, 94 Ill. 604; *Dickson v. Racine*, 61 Wis. 545; *In re Vacation of Centre Street*, 115 Pa. St. 247.

⁴ *Seely v. Pittsburgh*, 82 Pa. St. 360; *Washington Avenue, In re*, 69 Pa. St. 352; *Orphan Asylum's Appeal*, 111 Pa. St. 185; *Wistar v. Philadelphia*, 111 Pa. St. 604.

of the corporation, and the question of what property is within the corporate limits has been passed upon with various conclusions. But it is plain that tangible property, actually within the corporation, may be taxed by it irrespective of the domicile of the owner.¹

§ 1380. The same subject continued.—The doctrine of *mobilia sequuntur personam* is not allowed to stand in the way of the taxing power in the locality where the property has its actual *situs* and the requisite legislative jurisdiction exists. "Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. The personal property of a resident at the place of his residence is liable to taxation although he has no intention to become domiciled there."² The legislatures of the States usually

¹ *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423; *Trigg v. Glasgow*, 2 Bush (Ky.), 594; *Long v. Charleston*, 103 Mass. 278; *People v. Niles*, 35 Cal. 282; *New Albany v. Meekin*, 3 Ind. 471; *Augusta v. Dunbar*, 50 Ga. 387; *Mills v. Thornton*, 26 Ill. 300; *Finley v. Philadelphia*, 32 Pa. St. 381; *Sangamon & Co. v. Morgan County*, 14 Ill. 163; *Pomeroy Co. v. Davis*, 21 Ohio St. 555; *Dunleith v. Reynolds*, 53 Ill. 45; *People v. Ogdensburgh*, 48 N. Y. 390; *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580; *Hoyt v. Comm'rs*, 23 N. Y. 228; *Gilchrist's Appeal*, 109 Pa. St. 600. The power to tax all property within the corporate limits of a city does not authorize the taxation of its own bonds. *Macon v. Jones*, 67 Ga. 489. When, at the time of making out an assessment roll, the agent of a non-resident has on deposit in a bank moneys belonging to his principal, such money is liable to be assessed and taxed, although, prior to the time appointed for the correction of the roll, it has been withdrawn and used. *People v. Ogdensburgh*, 48 N. Y. 390, holding, also, that money due

upon a contract for the sale of lands is personalty, and such a contract, belonging to a non-resident, in the hands of a resident agent, may, for purposes of municipal taxation, be assessed to the agent. The Kentucky Court of Appeals held that the fact that a part of a bridge was within the corporate limits of a city did not authorize municipal taxation of the bridge because the corporate limits might be larger than the taxable boundary, and since the bed of the river could not be taxed the bridge could not. This case also held that a city has no power to tax property which is not benefited by its government. *Louisville Bridge Co. v. Louisville*, 81 Ky. 189. Decisions opposite to this were given in *St. Louis Bridge Co. v. East Louis*, 121 Ill. 238, and *State ex rel. Columbia Bridge Co. v. Columbia*, 27 S. C. 137.

² Mr. Justice Swayne, in *St. Louis v. Ferry Co.*, 11 Wall. 423, citing *Insurance Co. v. Comm'rs*, 28 Barb. 318; *Hoyt v. Comm'rs*, 23 Barb. 228; *Finley v. Philadelphia*, 32 Pa. St. 381; *Story's Conflict of Laws*, § 550. The *situs* of personal property, for the

limit municipal taxation to property within the corporate limits; and the questions which come before the courts are for the most part questions as to what property is considered to be within the municipality so as to give the right to tax it. In *New Albany v. Meekin*,¹ Perkins, J., in delivering the opinion of the court, said:—"We do not think that, for purposes of taxation, a court is authorized to apply the rule of law governing the personal estate of deceased persons which regards its *situs* as following the domicile of the owner."²

§ 1381. The same subject continued — Shares of stock.— Unless there is a statutory provision to the contrary, the *situs* of stock in a corporation follows the owner and adheres to his domicile;³ and if taxable at all to a person, shares of stock are taxable only at the place of residence of the holder.⁴ A statute or the charter may provide for the taxation of the shares at the place of business of the corporation, and then the tax may be enforced by requiring the corporation to withhold the amount from the dividends.⁵

purposes of taxation, does not follow the domicile of the owner. *New Albany v. Meekin*, 3 Ind. 481.

¹ 3 Ind. 481.

² See, also, *Gardiner & Co. v. Gardiner*, 5 Me. 133; *People v. Comm'rs*, 59 N. Y. 40; *Bates v. Mobile*, 46 Ala. 158; *Kirtland v. Hotchkiss*, 100 U. S. 491. As to the power to tax non-residents exercising an avocation within the corporation, see *Worth v. Comm'rs*, Winst. Eq. (N. C.) 70; *State v. Council*, 2 Speer's L. (S. C.) 623; *State v. Charleston*, 2 Speer's L. (S. C.) 719; *Bates v. Mobile*, 46 Ala. 158. As to taxableness of goods sold on commission but owned elsewhere, see *Shriver v. Pittsburgh*, 66 Pa. St. 446; *Cumming v. Savannah*, R. M. Charlt. (Ga.) 26; *Green v. Savannah*, R. M. Charlt. 368; *Paddleford v. Savannah*, 14 Ga. 438; *Pearce v. Augusta*, 37 Ga. 597.

³ *Whitesell v. Northampton*, 49 Pa. St. 526; *Fish v. Branin*, 23 N. J. Law,

484; *Bradley v. Bauder*, 36 Ohio St. 36; *Newark v. Assessor*, 30 N. J. Law, 13; *Great Barrington v. Comm'rs*, 16 Pick. 572; *Olliver v. Washington Mills*, 11 Allen, 268.

⁴ *Cornell v. Connersville*, 15 Ind. 150; *Griffith v. Watson*, 19 Kan. 26; *Griffith v. Carter*, 8 Kan. 565, 571; *Seward v. Rising Sun City*, 79 Ind. 353. Shares in a corporation are also shares of the stockholder, and if taxed to him as personalty can only be so taxed by the jurisdiction to which he is subject, whether the corporation be domestic or foreign. *Whitesell v. Northampton*, 49 Pa. St. 526; *State v. Bently*, 23 N. J. Law, 532; *Great Barrington v. Comm'rs*, 16 Pick. 572; *Fish v. Branin*, 23 N. J. Law, 484; *Newark v. Assessor*, 30 N. J. Law, 13.

⁵ *Tappan v. Bank*, 19 Wall. 490; *Dwight v. Mayor*, 12 Allen, 322; *Savings Bank v. Nassau*, 46 N. H. 398; *Delaware Railroad Tax*, 18 Wall. 230;

§ 1382. The same subject continued — Credits and choses in action — Insurance premiums.— An insurance company was held not liable to municipal taxation on the annual premiums received by an agent residing in the city, under a general power conferred upon the city to provide for the taxation of all taxable property within the corporation.¹ The *situs* of invisible and intangible property is with the owner. Notes, mortgages, etc., of an estate, under the control of an executor living in an incorporated city, though deposited outside the city, are liable to municipal taxation.²

§ 1383. The same subject continued — Vessels and ferry-boats.— The *situs* of sea-going vessels, for purposes of taxation, is the port where they are registered under the federal laws as their home port. This *situs* is not lost by mere absence and employment elsewhere, but continues until a new *situs* is acquired.³ Under a power to tax boats "within the city," it

National Bank v. Comm'rs, 9 Wall. 353; Van Allen v. Assessors, 3 Wall. 583; Union Bank v. State, 9 Yerg. 501; Richmond v. Daniel, 14 Gratt. 385.

¹ Dubuque v. Insurance Co., 29 Iowa, 9. But see Humphreys v. Norfolk, 25 Gratt. 97.

² Johnson v. Oregon, 2 Oregon, 327. But see Johnson v. Lexington, 14 B. Mon. (Ky.) 648. In Louisville v. Henning, 1 Bush, 381, it was held that money, debts and choses in action were not taxable under authority to tax all personal and real property of the inhabitants of the city. Power to tax "every species of property, real and personal, within the limits of the city, . . . which is or may be subject to taxation by the laws of the State," gives no power to tax notes or other evidences of debt on or against non-residents, belonging to residents. Bridges v. Griffin, 33 Ga. 113. But bonds owned by citizens and residents of Augusta, on non-residents, were held to be property within the

city and subject to municipal taxation under a general power to tax property within the city. Augusta v. Dunbar, 50 Ga. 387. This case supports the text, and the current of authorities, as cited by the judge (p. 393), is in the same direction. Money due upon a contract for the sale of lands is personal property, and where such a contract belonging to a non-resident is in the hands of an agent, it may be taxed by the municipality in which the agent resides. People v. Ogdensburgh, 48 N. Y. 390, holding, also, that moneys of a non-resident, deposited by an agent at his residence, are taxable there. Power to tax all personal estate gives authority to tax money loaned. Trustees v. McConnell, 12 Ill. 138. For the purpose of taxation a debt has its *situs* at the residence of the creditor, and may by there taxed. Kirtland v. Hotchkiss, 100 U. S. 491.

³ People v. Comm'rs, 58 N. Y. 242; Hayes v. Pacific &c. Co., 17 How. 596; Morgan v. Parkham, 16 Wall.

was held that a municipality had no authority to tax ferry-boats of a foreign private corporation when the relation of the boats to the city was simply that of contact, as a terminus of the voyage; and the real estate of the corporation, the home of the pilots and engineers, and the place where the boats were laid up when not in use, were on the opposite shore. This conclusion was not affected by the facts that the company had an office in said city, that its principal officers resided there, as well as most of its stockholders, and that the business meetings were held there, and moneys received and disbursed.¹

§ 1384. **Subjects of taxation.**—The power to determine what persons or property shall be taxed is left exclusively to the legislative department of the State or municipality;² but

471; *Wheeling &c. Co. v. Wheeling*, 99 U. S. 273; *Johnson v. Drummond*, 20 Gratt. 417; *Howell v. State*, 3 Gill (Md.), 14; *Perry v. Tossever*, 8 Ohio, 521. *Cf. Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365. The *situs* of a boat is the port where it is laid up when not in use, without respect to the residence of the owner. *Irvin v. New Orleans &c. R. Co.*, 94 Ill. 112. In Alabama it was held that a city, authorized to levy a tax "upon real and personal estate within the city," might assess a steamboat plying on the Alabama river, though registered and enrolled as a coasting vessel under the laws of the United States, if owned by citizens of the State residing in the city; and that the city had the same power if the owner was a citizen of another State, but resided in the city during the business season, even though the boat was assessed and taxed in the State in which the owner was a citizen. *Battle v. Mobile*, 9 Ala. 234. For the opposite and better view, see *New Albany v. Meekin*, 3 Ind. 481; *Wilkey v. Pekin*, 19 Ill. 160. *Cf. Mobile v. Baldwin*, 57 Ala. 61, as to ferry-boats.

¹ *St. Louis v. Ferry Co.*, 11 Wall. 423. See *contra*, *St. Louis v. Ferry Co.*, 40 Mo. 580.

² *Butler's Appeal*, 73 Pa. St. 448; *Sioux City v. School Dist.*, 55 Iowa, 150; *Wilson v. Mayor &c. of N. Y.*, 4 E. D. Smith, (N. Y.), 675; *Hill v. Higdon*, 5 Ohio St. 243; *State v. Parker*, 33 N. J. Law, 313; *State v. County Court*, 19 Ark. 360. The legislature may levy State taxes on corporations and exempt them from municipal taxation. *Portland v. Water Co.*, 67 Me. 185; *Kneeland v. Milwaukee*, 15 Wis. 454; *Illinois &c. R. Co. v. McLean County*, 17 Ill. 291; *New Orleans v. Savings Bank*, 31 La. Ann. 826; *Hunsaker v. Wright*, 30 Ill. 146. Unless the constitutional rule is decisive, the State legislature has full discretion. *Wisconsin &c. R. Co. v. Taylor County*, 52 Wis. 37; *Stratton v. Collins*, 43 N. J. Law, 563; *Le Duc v. Hastings*, 39 Minn. 110; *University v. Skidmore*, 87 Tenn. 155; *Gibson v. District of Columbia*, 116 U. S. 404; *New Orleans v. Fourchy*, 30 La. Ann., pt. 1, 910; *New Orleans v. People's Bank*, 32 La. Ann. 82.

the tax must be levied on the subjects thus chosen, so as to meet the constitutional requirement of equality and uniformity.¹ The State legislature is limited in its selection of subjects only by the constitution, but municipalities are not allowed such a wide discretion. Municipal charters may contain express limitations, or certain limitations may be implied. A charter power to "tax property within the city" has been held to authorize the taxation of visible property only, and not credits.²

§ 1385. The same subject continued.— License or privilege taxes cannot be imposed under a grant of general local legislation;³ and the power to tax personality has been held not to authorize the taxation of corporate stocks.⁴ Some miscellaneous cases touching the subject are cited in the notes.⁵

¹ Weeks v. Milwaukee, 10 Wis. 242; Brewer & Co. v. Brewer, 62 Me. 62; s. c., 16 Am. Rep. 395; People v. Coleman, 4 Cal. 46; State v. North, 27 Mo. 464; Durach's Appeal, 62 Pa. St. 491.

² Covington v. Powell, 2 Met. (Ky.) 226; Louisville v. Henning, 1 Bush (Ky.), 381; Johnson v. Lexington, 14 B. Mon. 521. Cf. Augusta v. National Bank, 47 Ga. 562, where a general power was held to justify taxing bank shares.

³ Sanders v. Comm'rs, 30 Ga. 679; Augusta v. Walton, 37 Ga. 620.

⁴ Richmond v. Daniel, 14 Gratt. 385. Cf. Augusta v. National Bank, 47 Ga. 562. See, also, Street Ry. Co. v. Philadelphia, 51 Pa. St. 465; Philadelphia v. Ferry Ry. Co., 52 Pa. St. 177; City Bank v. Bogel, 51 Tex. 355. A statute for the assessment of a special tax will not interfere with a general law unless there is the clearest language to justify it. State v. Douglass, 33 N. J. Law, 363; Smith v. Vicksburg, 54 Miss. 615.

⁵ A provision in a city charter that "all property not exempt from taxation under the general laws of this

State shall be subject to taxation, as herein mentioned, for city purposes," was held to embrace choses in action. Trimble v. City (Ky.), 12 S. W. Rep. 1066. A Georgia statute reserves to itself the right to tax railroad property, and provides the method. Under this statute a city cannot tax railroad property without charter authority. Albany v. Savannah & C. R. Co., 71 Ga. 158. A statute authorizing a city to levy a tax "upon all goods, wares and merchandise, and upon all articles of trade and commerce sold in said city," does not authorize a tax upon the gross receipts of a natural-gas company doing business in the city. Appeal of City of Pittsburgh (Pa.), 16 Atl. Rep. 92. In North Carolina, in a constitutional provision that laws shall be passed taxing by a uniform rule "all moneys, credits, . . . and also all real and personal property, according to its true value in money," the words "real and personal property" are held to include every kind of property, and a municipality exercising the taxing power must, regardless of charter provisions, tax *ad valorem*.

§ 1386. License fees and taxes on business.—The authority to license and regulate particular branches of business is usually regarded as a police power, but when license fees are imposed for purposes of revenue they are taxes.¹ Such license fees can only be considered as taxes when clearly authorized as such by the legislature.² And when a revenue authority

and by a uniform rule all property within the corporate limits, including moneys, credits, etc. *Redmond v. Town*, 106 N. C. 122; s. c., 10 S. E. Rep. 845; *Wood v. Town*, 106 N. C. 151; s. c., 10 S. E. Rep. 845. Under a Kentucky statute authorizing Newport to levy a city tax, *ad valorem*, "on the real, personal and mixed estate within the limits of said city subject to taxation by the city under the laws of the State," the city may levy taxes on choses in action upon non-residents, and on the stock of foreign corporations held by residents of the city. *City of Newport v. Ringo's Ex'r*, 87 Ky. 635; s. c., 10 S. W. Rep. 2. The money of a decedent in a bank is taxable where the decedent resided and not at the place of deposit. *San Francisco v. Lux*, 64 Cal. 481; s. c., 3 Am. & Eng. Corp. Cas. 537. Stocks and bonds held by a guardian are taxable at the residence of the infant. *City of Louisville v. Sherley*, 80 Ky. 71; s. c., 3 Am. & Eng. Corp. Cas. 541. Personal property of a non-resident at a railway station, awaiting shipment to the owner's residence, is not taxable at the station. *Standard Oil Co. v. Bachelor*, 89 Ind. 1; s. c., 3 Am. & Eng. Corp. Cas. 547. A claim under a judgment is taxable as personalty at its true value, and not at its nominal value, though held open by writ of error. *Cameron v. Cappeller*, 41 Ohio St. 533; s. c., 9 Am. & Eng. Corp. Cas. 438. Negotiable promissory notes, secured by mortgage on land, are taxable at the residence of the owner, and not at the *situs* of the mortgaged prop-

erty, though the notes are held for collection and re-investment by an agent residing at the *situs* of the property. *Boyd v. City of Selma* (Ala.), 11 So. Rep. 398, holding, also, that the term "personal property," as used in the charter of Selma, authorizing the levy by the city of a tax on real and personal property, includes solvent credits, such as negotiable promissory notes or other choses in action. See, also, *Boardman v. Supervisors*, 85 N. Y. 359.

¹ *Ould v. Richmond*, 23 Gratt. 464; *Wilmington v. Macks*, 86 N. C. 88; *Lightborne v. Taxing District* (Tenn.), 4 Lea, 219; *Ward v. Maryland*, 12 Wall. 418; *St. Louis v. Spiegel*, 75 Mo. 145. For a statement of the difference between the two powers, see *Rochester v. Upman*, 19 Minn. 108; *State v. Hoboken*, 33 N. J. Law, 280.

² *Kip v. Patterson*, 26 N. J. Law, 298; *New York v. Second Av. R. Co.*, 32 N. Y. 261; *St. Louis v. Boatman's Co.*, 47 Mo. 150; *Van Hook v. Selma*, 70 Ala. 361; *Davis v. Macon*, 64 Ga. 128; *Falmouth v. Watson*, 5 Bush, 660. Property taxed for revenue may also be subject to license taxes. *St. Louis v. Bucher*, 7 Mo. App. 169. A city which is authorized to impose a license tax on business may require the payment of the tax as a condition precedent to issuing the license. *Sights v. Yarnalls*, 12 Gratt. 292. An *ad valorem* tax on property does not preclude a license tax on the business in which the property is used. *Ex parte Mirandi*, 73 Cal. 365; s. c., 14 Pac. Rep. 888.

seems to be conferred, the amount of the tax, unless limited by the grant, is left to the discretion of the municipality; but such a grant of authority would not warrant taxes sufficiently heavy to be prohibitory.¹

§ 1387. **The same subject continued.**—A municipality may tax avocations pursued within its limits by persons whose domestic residence is outside the corporation, as though they were residents.² The power of the State to tax professions is unquestioned, and the State may delegate the authority to municipalities.³ The provisions of the constitutions as to equality and uniformity apply to property alone and not to taxation on privileges or occupations. A special tax on a business or profession does not violate the rule of uniformity, for it is uniform as to all persons who come within the same category.⁴

¹ *Craig v. Burnett*, 32 Ala. 728; *Burlington v. Ins. Co.*, 31 Ind. 102; *Kniper v. Louisville*, 7 Bush, 599; *Mason v. Lancaster*, 4 Bush, 406; *Kitson v. Ann Arbor*, 26 Mich. 325. A constitutional inhibition of imprisonment for debt has no application to a license tax. *Charleston v. Oliver*, 16 S. C. 47. See, also, *Butler's Appeal*, 73 Pa. St. 448.

² *Worth v. Fayetteville Comm'rs*, Winst. (N. C.) Eq. 70 (Repr. 617); *State v. Charleston*, 2 Speer's L. (S. C.) 623; *State v. Charleston*, 2 Speer's L. (S. C.) 719. A party carrying on a business outside the corporate limits, but residing within the city, and who keeps the capital employed in his business there, is not liable to pay a license city tax. *Bates v. Mobile*, 46 Ala. 158, where the court states that the converse of this would be true. The imposition of a tax upon goods conveyed from other States to be sold on commission is not in violation of the federal constitution. *Cumming v. Savannah*, R. M. Charlt. (Ga.) 26. Of similar import is *Green v. Savannah*, R. M. Charlt. (Ga.) 368. See, also, *Padelford v. Savannah*, 14

Ga. 438; *Pearce v. Augusta*, 37 Ga. 597; *Schrivver v. Pittsburgh*, 66 Pa. St. 466.

³ *St. Louis v. Laughlin*, 49 Mo. 559; *Simmons v. State*, 12 Mo. 268; *St. Louis v. Steinberg*, 4 Mo. App. 453.

⁴ *Sacramento v. Crocker*, 16 Cal. 119; *Magneau v. City of Fremont*, 30 Neb. 843; s. c., 47 N. W. Rep. 280; *People v. Hartwell*, 12 Mich. 508; *State v. Jones*, 19 Ind. 356; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Young v. Henderson*, 76 N. C. 420; *Dishon v. Smith*, 10 Iowa, 212; *State v. Orvis*, 20 Wis. 235; *Washington v. State*, 13 Ark. 752; *Ash v. People*, 11 Mich. 347; *Addison v. Sauliner*, 19 Cal. 82; *New Orleans v. Turpin*, 13 La. Ann. 56; *McGee v. Mathis*, 21 Ark. 40; *Bohler v. Schneider*, 49 Ga. 195; *Bright v. McCullough*, 27 Ind. 223; *Pleuler v. State*, 11 Neb. 547; *Thomasson v. State*, 15 Ind. 549; *Baker v. Cincinnati*, 11 Ohio St. 534; *Chaddock v. Day*, 75 Mich. 527; s. c., 4 L. R. An. 809; *People v. Coleman*, 4 Cal. 46; *Ex parte Robinson*, 12 N. v. 263; *Gatlin v. Tarboro*, 78 N. C. 119; *Walters v. Duke*, 31 La. Ann. 668; *Glasgow v. Rowse*, 43 Mo. 479; *Home*

§ 1388. **The same subject continued**—**The power strictly construed.**—The power to tax occupations is peculiarly subject to the rule of strict construction, and any exaction of such a tax not authorized by a strict construction of the statute will be illegal.¹ Yet it is held competent for the legislature to authorize a tax on business where the business is one which the legislature is forbidden by the constitution to license. There is no necessary connection between a license and a tax, as a business may be licensed and not taxed, or it may be taxed and not licensed. A license confers a privilege, and the privilege is sometimes taxed, as when a city is authorized to tax an occupation licensed by the State.²

Ins. Co. v. Augusta, 50 Ga. 530; *Eyre v. Jacob*, 14 Gratt. 422; *Slaughter v. Commonwealth*, 13 Gratt. 767; *Adams v. Somerville*, 2 Head, 363; *Aulanier v. Governor*, 1 Tex. 655; *Walker v. Springfield*, 94 Ill. 364; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Boge v. Girardey*, 28 La. Ann. 717; *Texas Banking Ins. Co. v. State*, 42 Tex. 636; *St. Louis v. Green*, 7 Mo. App. 468; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 587. A power to impose a license tax upon specified occupations, and "upon any other person or employment which it (the city) may deem proper, whether such person or employment be herein specially enumerated or not," was held not to confer power to tax a railroad. *Lynchburg v. Norfolk &c. R. Co.*, 80 Va. 237. A charter provision giving power to license and tax certain enumerated classes of persons and business, and "all other business, trades, avocations and professions whatever," was held not to authorize a license tax upon lawyers. *St. Louis v. Laughlin*, 49 Mo. 559. *Contra*, *Lanier v. Mayor*, 59 Ga. 187. Authority to tax a profession may be executed by taxing each member of a firm. *Lanier v. Mayor*, *supra*; *Wilder v. Savannah*, 70 Ga. 760.

¹ *Latta v. Williams*, 87 N. C. 126; *Robinson v. Franklin*, 1 Humph. 156; *St. Louis v. Laughlin*, 49 Mo. 559; *Dubuque v. Insurance Co.*, 29 Iowa, 9; *Charleston v. Oliver*, 16 S. C. 47; *New Ibera Trustees v. Miques*, 32 La. Ann. 923; *Kip v. Patterson*, 26 N. J. Law, 298. If a minimum tax has been prescribed by statute, one which exceeds that sum, but is measured by the business, is void. *Kniper v. Louisville*, 7 Bush, 599.

² *Youngblood v. Sexton*, 32 Mich. 406, where the subject is fully discussed and cases cited. *Of. State v. Hipp*, 38 Ohio St. 129; *Butzman v. Whitbeck*, 42 Ohio St. 223; *State v. Jinks*, 42 Ohio St. 345. See, also, *Kehrig v. Peters*, 41 Mich. 475; *Richland County v. Richland*, 59 Wis. 591; s. c., 18 N. W. Rep. 497. Neither a power to tax nor a power to regulate gives authority to license. *Burlington v. Bumgardner*, 42 Iowa, 673. A license fee charged by a municipality for the doing of a thing which it has the power to license or prohibit is not a tax but a price paid for a privilege, and the corporation may apply the funds so raised to schools, though the constitution requires municipal taxes to be applied to municipal purposes. *East St. Louis v. Trustees*, 102 Ill. 489.

§ 1389. Local taxation of transportation companies.—

The property of a street railroad company, including its road-bed, is ordinarily subject to municipal taxation, and, unless other provision is made, a street railway may be taxed as realty.¹ The payment to the city of a tax or license fee of \$25, as required by contract, securing certain franchises to the company, was held not to exonerate the company from the payment of an *ad valorem* tax on its property assessable for municipal purposes.² And an exclusive grant of the use of streets to such railway company does not deprive the municipality of the right, existing in respect to such lines in general, to require the license fee or tax.³ Municipal taxation of railroads depends upon statutory provisions, which are very diverse. Most of the decisions of the courts relate to the construction of special statutes, and such statutes and cases cannot be profitably cited in this connection.⁴

§ 1390. Banks.—Where under a special charter or a general statute the capital of a State bank is taxable only for State purposes, a municipal tax on real estate forming part of the capital stock was held illegal;⁵ and when the State was restricted in the taxation of banks, such restriction was held to apply to municipalities.⁶ A banker is liable to taxation only on such moneys and credits as he holds as *owner* and not for those he holds in trust. Deposits are taxable to depositors

¹ *People v. Cassidy*, 2 Lansing (N. Y.), 294; *North Beach & C. R. Co.'s Appeal*, 32 Cal. 499; *Middlesex R. Co. v. Charleston*, 8 Allen, 330; *Providence & C. R. Co. v. Wright*, 2 R. I. 459. For construction of statutes respecting elevated railroads in New York, see *People v. Comm'rs*, 82 N. Y. 462.

² *Railway Co. v. Louisville*, 4 Bush (Ky.), 478. See, further, as to license fees, *New York v. Broadway & C. R. Co.*, 17 Hun, 242; *Union & C. Ry. Co. v. Philadelphia*, 101 U. S. 528; *City of New York v. South Covington & C. Co.*, 89 Ky. 29; s. c., 11 S. W. Rep. 954.

³ *State v. Herod*, 29 Iowa, 123;

Columbus v. Street R. Co., 45 Ohio St. 98; *Los Angeles v. Southern Pacific R. Co.*, 67 Cal. 433. See, also, *Des Moines v. Chicago & C. R. Co.*, 41 Iowa, 567.

⁴ The rolling stock of a company was held taxable where the property of the superintendent or agent is taxed, it being, in contemplation of law, his own. *Dubuque v. Ill. Cent. R. Co.*, 39 Iowa, 56.

⁵ *Bank v. Madison*, 3 Ind. 43. Cf. *Gardner v. State*, 21 N. J. Law, 557.

⁶ *New Orleans v. Bank*, 15 La. Ann. 107; *New Orleans v. Bank*, 11 La. Ann. 41; *Municipality v. State Bank*, 5 La. Ann. 394; *New Orleans v. Commercial Bank*, 10 La. Ann. 735.

and not to the bank.¹ Bank stocks in which a savings institution has invested its deposits for income cannot be taxed to the corporation under a statute which provides for taxing the deposits to depositors at their residences.² All the property of a bank, including its franchise and capital stock, is taxable like the property of an individual unless the charter provides otherwise.³ A private banker is for purposes of taxation a resident where the bank is located, although actually residing elsewhere.⁴

§ 1391. **The same subject continued.**—Shares of stock are assessed to the owner at his residence; and while a city may tax stockholders of a bank on their shares, this taxation would imply the exclusion of taxation on the capital stock.⁵ Taxes should be assessed directly against the shares of stockholders in national banks.⁶ The term "*inhabitants*" includes corporations,⁷ and it has been held that a banking corporation located in a village is liable to pay its proportion of village taxes, and its real and personal estate is accordingly subject

¹ Branch v. Marengo, 43 Iowa, 600.

² Providence Institution v. Gardiner, 4 R. I. 484.

³ State v. Bank of Smyrna, 2 Houst. 99. Investments abroad are still the property of the bank and part of its capital. Nevada Bank v. Sedgwick, 104 U. S. 111.

⁴ Miner v. Fredonia, 27 N. Y. 155. Cf. Gardiner v. Gardiner, 5 Me. 133; Bates v. Mobile, 46 Ala. 158. Bank stock is personal estate and follows the person of the owner. Duer v. Small, 4 Blatchf. 263.

⁵ Newman v. Wait, 46 Vt. 689; Bank of Georgia v. Savannah, Dud. 132. See, also, State v. Innis, 23 N. J. Law, 546; Johnson v. Comm'rs, 7 Dana, 338.

⁶ Lionberger v. Rowse, 43 Mo. 67; First National Bank v. Meredith, 44 Mo. 500; State v. Dowling, 50 Mo. 134. For other decisions on the taxation of banks and bank stock by municipalities, see Evansville v. Hall,

14 Ind. 27; King v. Madison, 17 Ind. 48; Connersville v. Bank, 16 Ind. 105; Madison v. Whitney, 21 Ind. 261; Bank v. Madison, 3 Ind. 43; Gordon v. Baltimore, 5 Gill (Md.), 231; and compare Gordon v. Court, 3 How. 133; Bank v. Chester, 10 Rich. L. (S. C.) 104; State v. Charleston, 5 Rich. L. (S. C.) 561; State Bank v. Charleston, 3 Rich. L. (S. C.) 343; Bulow v. Charleston, 1 Nott & McC. 527; Cherokee &c. Co. v. Whitfield, 28 Ga. 121; Bank v. Savannah, Dudley, 130; Savannah v. Hartridge, 8 Ga. 23; Nashville v. Thomas, 5 Cold. (Tenn.) 600; O'Donnell v. Bailey, 24 Miss. 386; Macon v. Bank, 60 Ga. 133; City Bank v. Bogel, 51 Tex. 354. In Madison v. Whitney, 21 Ind. 261, it was decided that bank stock owned by non-residents cannot be taxed by the city, as it can have no *situs* other than the domicile of the owner.

⁷ People v. Utica Ins. Co., 15 Johns. 382.

to taxation; and that, where such village taxes are directed to be levied upon the "*freeholders and inhabitants* of the village according to law," a monied or stock corporation, having its banking-house or office within such village, was an inhabitant within the meaning of the act.¹

§ 1392. Miscellaneous property — Water companies.— A water company which supplies a city with water, and whose rates are regulated by the city council, is nevertheless a private corporation whose property is subject to taxation.² The property of gas and water companies within the municipality is usually taxable by it.³ And the proprietor of city water-works for a term of twenty years, whose contract did not stipulate for exemption, was held to be taxable on such works, they being treated as realty.⁴ But it was subsequently decided that such proprietor could not be required to pay a license or privilege tax during the twenty years, the contract stipulating that he should remain in "quiet possession of said water-works during said term, without let, molestation or hindrance" on the part of the city.⁵ It has been held that, in the absence of constitutional inhibition, the legislature might empower a city to exempt from taxation for a term of years the property of a water company in consideration of an agreement by the company to furnish free of cost a supply of water for municipal purposes.⁶

§ 1393. Gas companies.— There is a conflict of authority as to taxation of gas-pipes as real estate. On the one hand they are regarded as the personal property of the company,

¹ *Ontario Bank v. Bonnell*, 10 Wend. 186.

² *Des Moines Water Co.'s Appeal*, 48 Iowa, 324. In this case it was decided that the land, buildings, machinery, water-mains, and all real estate, were taxable in the township in which was situated the machinery which propelled the water. The legislature may restrict the tax authorized to be levied for water-works to the district which is to be benefited. *Grant v. Davenport*, 36 Iowa, 316.

³ *Commonwealth v. Lowell Co.*, 12 Allen, 75.

⁴ *Stein v. Mobile*, 24 Ala. 591; *Stein v. Mobile*, 17 Ala. 234.

⁵ *Stein v. Mobile*, 49 Ala. 362; s. c., 20 Am. Rep. 283. Cf. *Stein v. Mobile*, 17 Ala. 234, where the value of the franchise was considered in estimating the value of the taxable property.

⁶ *Portland v. Water Co.*, 67 Me. 135. *Contra*, *City of Austin v. Gas Co.*, 69 Tex. 187; *Altgelt v. San Antonio* (Tex.), 17 S. W. Rep. 75.

and as mere appurtenances of the realty on which the works are situated, and are so assessed;¹ while on the contrary they have been held subject to taxation as real estate.² The legislature may tax the capital stock of gas companies, while it exempts the stock of manufacturing companies, as they are different classes.³ "*Machinery*" includes gas-pipes under the streets and gas-meters, and when the value of machinery is deducted in ascertaining the value of stock, gas-pipes used in distributing the gas are regarded as "*machinery*" used in the manufacture of gas.⁴

§ 1394. Miscellaneous corporations.—An act exempting the capital stock and personal property of specified corporations applies to State taxation only and does not affect the right to tax for municipal purposes.⁵ And a provision that a certain rate shall be paid in lieu of all other taxes to the State does not exempt from liability from municipal taxes.⁶ A State

¹ *People v. Citizens' Co.*, 39 N. Y. 81; *Memphis Gas Co. v. State*, 6 Cold. (Tenn.) 310; *Capital Gas-light Co. v. Charter Oak Co.*, 51 Iowa, 34; *Des Moines Water Co.'s Appeal*, 48 Iowa, 324; *West Chester Gas Co. v. Chester*, 30 Pa. St. 232. In the latter case it was decided that houses erected by the company for the use of their workmen were taxable as realty, they not being necessary to the performance of the company's work.

² *Providence Gas Co. v. Thurber*, 2 R. I. 15.

³ *Coatesville Gas Co. v. Chester*, 97 Pa. St. 476; *Williams v. Rees*, 9 Biss. 405.

⁴ *Commonwealth v. Lowell Co.*, 12 Allen, 75; *Providence Gas Co. v. Thurber*, 2 R. I. 15; *Hamilton v. Massachusetts*, 6 Wall. 632; *Memphis Gas-light Co. v. State*, 6 Cold. (Tenn.) 310.

⁵ *Protestant Home v. Mayor*, 35 N. J. Law, 157; *People v. Davenport*, 91 N. Y. 574; *Orange &c. R. Co. v. Alexandria*, 17 Gratt. 176; *In re New*

York, 11 Johns. 77; *Buffalo Cemetery v. Buffalo*, 46 N. Y. 506. An exemption from a State tax will not preclude the levy of a municipal tax. *City v. Hannibal &c. R. Co.*, 39 Mo. 476; *Lexington v. Lull*, 30 Mo. 480; *Paris v. Farmers' Bank*, 30 Mo. 575; *Pac. R. Co. v. Cass*, 53 Mo. 17. Nor from a school tax. *Martin v. Charleston*, 13 Rich. Eq. 50.

⁶ *Brighton v. Kirner*, 22 Wis. 54; *Sheehan v. Hospital*, 50 Mo. 155; *Dunleith &c. Bridge Co. v. Dubuque*, 32 Iowa, 427. Exemption from taxation includes exemption from a privilege tax. *State v. Branin*, 23 N. J. Law, 484. Exemption from taxation of every kind does not exempt from taxation for street improvements. *Grand Gulf &c. R. Co. v. Buck*, 53 Miss. 246. An exemption of a corporation applies not merely to the State but to every public corporation created by it. *Bank v. Charleston*, 3 Rich. Law, 342; *Bank v. Edwards*, 5 Ired. Law, 516; *Richmond v. Richmond &c. R. Co.*, 21 Gratt. 604.

tax which entitles an insurance company to do business in any part of the State "without payment of any additional tax" will not prohibit a municipal tax on the same company.¹

§ 1395. **Apportionment by benefits.**—State legislatures have sometimes applied the principle of taxation by benefits to the case of general city taxation, constituting two districts; one, consisting of the whole city, to be assessed equally; the other, consisting of the more compact portions, and receiving a larger share of benefit from the city government, being required to pay a greater share of the expenses of the government.² The same principle is applied in constituting "overlying districts" for the assessment of a tax for a local improvement, such as a State capitol or a canal, where a local benefit would be conferred.³ Sometimes the legislature apportions the tax as between *districts* according to the supposed interest which each has in the proposed improvement. This is often necessary in the case of roads and bridges.⁴

¹ *Humphreys v. Norfolk*, 25 Gratt. 97. So held as to telegraph companies, unless a plain intention to exempt such companies from municipal taxes appears. *Western Union Tel. Co. v. Richmond*, 26 Gratt. 1. Other cases on the subject: *Ottawa Gas Co. v. McCaleb*, 81 Ill. 556; *Pacific Hotel v. Lieb*, 83 Ill. 602; *Danville & Co. v. Parks*, 88 Ill. 463; *Porter v. Rockford*, 76 Ill. 561; *St. Louis v. Insurance Co.*, 12 R. I. 435, *Dubuque v. Insurance Co.*, 29 Iowa, 9; *Republic & Co. v. Pollock*, 75 Ill. 292. An exemption of stock of a corporation does not exempt it from a license tax. *New Orleans v. Canal & Co.*, 32 La. Ann. 105.

² *Norris v. Waco*, 57 Tex. 635; *Marshall v. Donovan*, 10 Bush, 681; *Henderson v. Lambert*, 8 Bush, 607; *Serrill v. Philadelphia*, 38 Pa. St. 355; 358; *Benoist v. St. Louis*, 19 Mo. 179; *Lee v. Thomas*, 49 Mo. 112. See, also, *Gillette v. Hartford*, 31 Conn. 351; *Zanesville v. Richards*, 5 Ohio St. 590. The doctrine is opposed in

Knowlton v. Supervisors, 9 Wis. 410; *New Orleans v. Cazelar*, 27 La. Ann. 156. Cf. *Wisconsin & C. R. Co. v. Taylor County*, 52 Wis. 37, 69. Since special taxation is not dependent upon the receipt of special benefit, it is not necessary that before the ordinance is passed there should be an examination and determination of the probable benefits to be received from the improvements. *City of Galesburg v. Searles*, 114 Ill. 217; s. c., 29 N. E. Rep. 686. It should be stated that in Illinois a special tax and a special assessment are governed by different rules.

³ *Kirby v. Shaw*, 19 Pa. St. 258; *Thomas v. Leland*, 24 Wend. 65; *Harbor Comm'rs v. State*, 45 Ala. 399; *Gordon v. Cornes*, 47 N. Y. 608; *Livingston County v. Darlington*, 101 U. S. 407; *Merrick v. Amherst*, 12 Allen, 500.

⁴ *Supervisors & Co. v. People*, 110 Ill. 511; *Salem Turnpike v. Essex County*, 100 Mass. 282; *Shaw v. Dennis*, 10 Ill. 405.

Local city improvements, including the construction and improvement of streets, may be provided for in the same way; but it is perceived that in no case whatever can a special assessment or tax be levied without express authority of the State legislature. Such a tax cannot be imposed under a general power to tax for corporate purposes, and a power of that kind, when plainly granted, must be strictly construed.¹

§ 1396. Agricultural lands.—The law does not appear to be clearly settled as to the power of a city or village to tax, for municipal purposes, agricultural lands lying within the corporate limits. A majority of the cases seem to decide that, when the legislature fixes the corporate boundaries, without any provision for a discrimination in taxation, it in effect determines that no such discrimination should be made. The constitution leaves the whole subject to the discretion of the legislature; and usually any injustice or irregularity can be relieved only by the legislature.²

¹ See *Cooley on Taxation*, p. 609; *Municipality v. White*, 9 La. Ann. 446; *Chicago v. Larned*, 34 Ill. 203; *Municipality v. Dunn*, 10 La. Ann. 57; *Ottawa v. Spencer*, 40 Ill. 211; *Patton v. Springfield*, 99 Mass. 627. A city has no power to tax property which derives no benefit from its government. *Louisville Bridge Co. v. Louisville*, 81 Ky. 189. *Contra*, *St. Louis Bridge Co. v. City &c.*, 121 Ill. 238; s. c., 12 N. E. Rep. 723.

² Agricultural lands within a city were held not subject to city taxation. Seven years later, improvements were extended toward these lands, and additional houses were built upon them, but no streets or improvements were near enough to be of any use. The land was still held not subject to taxation by the city. *City of Covington v. Arthur* (Ky.), 14 S. W. Rep. 121. See, also, *Mendenhall v. Burton*, 42 Kan. 570. On the other hand, it has been held that the fact that the owner chose to hold such land for agricultural purposes

did not exempt it from city taxation. *State v. Brown*, 20 Atl. Rep. 772; *Torbitt v. City of Louisville* (Ky.), 4 S. W. Rep. 345. See, also, *Perkins v. City of Burlington*, 77 Iowa, 553; s. c., 42 N. W. Rep. 441. Lands situate within the corporate limits of a city, though used solely for agricultural purposes, are subject to municipal taxation. *Town of Dixon v. Mayes*, 72 Cal. 166; s. c., 13 Pac. Rep. 471, following *City of Santa Rosa v. Coulter*, 58 Cal. 537. Farming land in the corporate limits, but entirely outside the platted and settled portions, cannot be taxed for municipal purposes where the owner will derive no benefit from the expenditure of the tax by the extension of improvements in that direction. *Ellison v. Lindford* (Utah), 25 Pac. Rep. 744. *Contra*, *Hurla v. City of Kansas City* (Kan.), 27 Pac. Rep. 143; *McClay v. City of Lincoln* (Neb.), 49 N. W. Rep. 282. A farm inside the corporate limits is subject to taxation for municipal purposes if it is within

§ 1397. **The same subject continued.**—The preceding section summarizes the law as it is generally decided outside of Iowa and Kentucky;¹ but in those States it is held that municipal taxation cannot be imposed upon real estate within the corporate limits if it derives no benefit from its connection with the municipality.² And the courts must consider the purpose for which land is held, whether for agricultural purposes or for sale as city lots, before relief from taxation is granted.³

§ 1398. **The same subject continued — New Jersey and Wisconsin decisions.**—A late New Jersey case decides that presumptive, not actual, benefit to the tax-payer applies to general taxation, as distinguished from special taxation for local benefits, and rural land within the city limits cannot be relieved from municipal taxation on the ground that it receives no benefit from the city government.⁴ In a Wisconsin case the court said:—“If a rule of taxation should be adopted which limits the right of taxation for public improvements to

the range of municipal improvements and benefits. *Cook v. Crandall* (Utah), 26 Pac. Rep. 927. In Wisconsin a statute provides that, upon the resolution of the electors of towns which contain an unincorporated village of at least one thousand inhabitants, such towns may exercise the powers conferred on certain incorporated villages. Taxes were levied by the town for the support and improvement of a village of that kind after the required resolution had been passed at a town meeting. Such taxes were held not invalid on the ground of public policy, though property outside of the village, on which the tax fell, was not directly benefited. *Land & C. Co. v. Brown*, 73 Wis. 294; s. c., 40 N. W. Rep. 482. The provision of a city charter regulating taxes on agricultural lands within the corporation limits is not a contract, and may be changed by amendment. *Washburn v. City of Oshkosh*,

60 Wis. 453; s. c., 5 Am. & Eng. Corp. Cas. 517.

¹ *Municipality No. 3 v. Michaud*, 6 La. Ann. 605; *Allen v. St. Louis*, 13 Mo. 400; *Russell v. St. Louis*, 9 Mo. 507; *Lee v. Thomas*, 49 Mo. 112; *Walden v. Dudley*, 49 Mo. 421; *Patterson v. McReynolds*, 61 Mo. 203; *Turner v. Althaus*, 6 Neb. 54. See, also, *Oliver v. Omaha*, 3 Dill. 360; *Kountze v. Omaha*, 5 Dill. 443.

² *Cheaney v. Hooser*, 9 B. Mon. 330; *Sharp's Executor v. Dunavan*, 17 B. Mon. 223; *Courtney v. Louisville*, 12 Bush (Ky.), 419; *Butler v. Muscatine*, 11 Iowa, 433; *Buell v. Ball*, 20 Iowa, 282; *Brooks v. Polk County*, 52 Iowa, 460. See, also, *Cary v. Pekin*, 88 Ill. 154.

³ *Walters v. Shields*, 2 Met. (Ky.) 553; *Arbegas v. Louisville*, 2 Bush (Ky.), 271; *Swift v. City of Newport*, 7 Bush (Ky.), 37; *Durant v. Kauffman*, 34 Iowa, 194.

⁴ *State v. Brown* (N. J., 1890), 20 Atl. Rep. 772.

such property only as it can be shown is directly benefited by such improvement, it would result in endless confusion and litigation and render void very many acts for the government of towns and counties.”¹ In most of the States there are statutory provisions respecting the taxation of rural property within corporation limits.²

§ 1399. Taxation after changing the corporate limits.—

When the corporate limits are extended the courts will sometimes inquire into the facts, to determine whether or not the extension was made to subject to taxation property that would not receive benefits from the municipality, and will protect the owners of such property from unjust taxation. The courts do not assume to nullify the act of extension, but undertake to relieve against its consequences. It is only a palpable perversion of the power to tax that justifies judicial interference; and even in cases of that kind the judicial authority is doubtful, since the judiciary has no general authority to correct legislative action in matters of taxation.³ But if the State legislature attempts to bring in territory not contiguous, for the purpose of increasing local revenues, its action may be treated as void.⁴ Iowa and Kentucky stand firmly in favor of judicial interference.⁵

¹Taylor, J., in *Land & Co. v. Brown*, 73 Wis. 294; s. c., 40 N. W. Rep. 482.

²Such acts have been construed in the following cases:—*Terrill v. Philadelphia*, 38 Pa. St. 355; *Kalbrier v. Leonard*, 34 Ind. 497; *Barker v. State*, 48 Ohio, 514; *Gillett v. Hartford*, 31 Conn. 351; *United States v. Memphis*, 97 U. S. 284; *Dickerson v. Franklin*, 112 Ind. 178; s. c., 13 N. E. Rep. 579; *Leeper v. South Bend*, 106 Ind. 375; *Simms v. City of Paris (Ky.)*, 1 S. W. Rep. 543.

³*Logansport v. Seybold*, 59 Ind. 225; *Stilz v. Indianapolis*, 55 Ind. 515; *Kirby v. Shaw*, 19 Pa. St. 258, 261; *Waco v. Texas*, 57 Tex. 635; *Martin v. Dix*, 52 Miss. 53; *Giboney v. Cape Girardeau*, 58 Mo. 141; *Linton v. Athens*, 53 Ga. 588; *New Orleans v.*

Cazelar, 27 La. Ann. 156; *Stoner v. Flournoy*, 28 La. Ann. 850; *Kelley v. Pittsburgh*, 85 Pa. St. 170; s. c., 104 U. S. 78; *Hewitt's Appeal*, 88 Pa. St. 55; *Cary v. Pekin*, 88 Ill. 154; *Oliver v. Omaha*, 3 Dill. 368; *Washburn v. Oshkosh*, 60 Wis. 453.

⁴*Smith v. Sherry*, 50 Wis. 210. A city cannot be permitted to retain land within its boundaries not needed for city purposes, and not benefited by being within the corporation, merely to raise money from it by taxation. *Evans v. City of Council Bluffs*, 65 Iowa, 238; s. c., 8 Am. & Eng. Corp. Cas. 510.

⁵*Deeds v. Sanborn*, 26 Iowa, 419; *Davis v. Dubuque*, 20 Iowa, 458; *Deiman v. Fort Madison*, 30 Iowa, 542; *Durant v. Kauffman*, 34 Iowa,

§ 1400. **The same subject continued.**—The legislature has power to include within the corporate limits contiguous or other territory, and this without consulting with the old or new inhabitants. This would extend the taxing power over the new territory, and, in the absence of constitutional restrictions or statutory provisions, this annexed property may be taxable to discharge pre-existing municipal debts.¹

§ 1401. **The same subject continued—Kentucky and Iowa decisions.**—Kentucky and Iowa go even to the extent of affirming that the legislature not only lacks power to tax lands outside the limits of a city for city purposes, but declare that it cannot extend the limits of a city in order to include in the corporation farming lands, occupied for agricultural purposes, and not needed for streets or houses, or other city purposes, when the purpose is to increase the municipal revenue by taxation.²

194; Cheaney v. Hooser, 9 B. Mon. 330; Swift v. Newport, 7 Bush, 37; Covington v. Southgate, 15 B. Mon. 491; Sharp's Executor v. Dunavan, 17 B. Mon. 223; Arbegast v. Louisville, 2 Bush, 271; Courtney v. Louisville, 12 Bush, 419; Morford v. Unger, 8 Iowa, 82; Langworthy v. Dubuque, 13 Iowa, 86; Fulton v. Davenport, 17 Iowa, 404; Buell v. Ball, 20 Iowa, 282.

¹ Washburn v. Oshkosh, 60 Wis. 453; Blanchard v. Bissell, 11 Ohio St. 96; Powers v. Wood County, 8 Ohio St. 285. See, further, Chandler v. Boston, 112 Mass. 200; Railroad Co. v. Spearman, 12 Iowa, 112; Wade v. Richmond, 18 Gratt. (Va.) 583; Norris v. Mayor, 1 Swan (Tenn.), 167; Smith v. McCarthy, 56 Pa. St. 359; St. Louis v. Allen, 13 Mo. 400; Queen v. Board, L. R. 8 Q. B. 227; Laramie v. Albany, 92 U. S. 307; Woods v. Henry, 55 Mo. 560; State v. McReynolds, 61 Mo. 203; Layton v. New Orleans, 12 La. Ann. 515; Gorham v. Springfield, 21 Me. 59; St. Louis v. Russell, 9 Mo. 507; Elston v. Craw-

fordsville, 20 Ind. 272; Edmunds v. Goodkins, 20 Ind. 477; Girard v. Philadelphia, 7 Wall. 1; Covington v. East St. Louis, 78 Ill. 548; Graham v. Greenville, 67 Tex. 62; Board of Chickasaw v. Board, 58 Miss. 619. See, also, United States v. Memphis, 97 U. S. 284; Warner v. Charlestown, 2 Gray, 104, as to the general power of the legislature to change corporate boundaries; and Norris v. Nashville, 6 Lea (Tenn.), 337. For the construction of Pennsylvania statutes, see Devore's Appeal, 56 Pa. St. 163; Borough of Blooming Valley, 56 Pa. St. 66; Borough of Little Meadows, 35 Pa. St. 335. Of Indiana statutes, Jeffersonville v. Weems, 5 Ind. (Porter), 547; Hoff v. Lafayette, 108 Ind. 14; Taylor v. Fort Wayne, 47 Ind. 274. As to effect on *homestead right*, see Taylor v. Boulware, 17 Tex. 74; Finley v. Dietrick, 12 Iowa, 516; Truax v. Pool, 46 Iowa, 256.

² Covington v. Southgate, 15 B. Mon. (Ky.) 491; Arbegast v. Louisville, 2 Bush (Ky.), 271; Swift v. Newport, 7 Bush (Ky.), 37; Morford v. Unger, 8

§ 1402. Effect of change of corporate limits.— When corporate limits are extended the annexed territory will become, in the absence of legislation to the contrary, subject to taxation for all municipal indebtedness then existing.¹ And it is immaterial that the addition is effected by the consolidation of two municipalities.²

Iowa, 82; *Langworthy v. Dubuque*, 13 Iowa, 86; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Fulton v. Davenport*, 17 Iowa, 404; *Sharp v. Dunavan*, 17 B. Mon. (Ky.) 553; *Buell v. Ball*, 20 Iowa, 282. See, to the same purpose, *Bradshaw v. Omaha*, 1 Neb. 16; *Durant v. Kauffman*, 34 Iowa, 194. *Contra*, *Giboney v. Cape Girardeau*, 58 Mo. 141; *Martin v. Dix*, 52 Miss. 53; *Stilz v. Indianapolis*, 55 Ind. 515. *Cf.* *Kelley v. Pittsburg*, 85 Pa. St. 170; *Weeks v. Milwaukee*, 10 Wis. 242; *Hewitt's Appeal*, 88 Pa. St. 55; *Norris v. Waco*, 57 Tex. 635; *Stoner v. Flournoy*, 28 La. Ann. 850; *Washburn v. Oshkosh*, 60 Wis. 453. The legislature cannot annex to a village territory not contiguous for the purpose of increasing its revenues. *Smith v. Sherry*, 50 Wis. 210. Under the code of Iowa providing for annexation of territory to a municipality, the inhabitants of the territory so annexed cannot complain of the levy of municipal taxes or assessments on their property, on the ground that it is situated in a river bottom which is sometimes subject to overflow. *Ford v. North Des Moines*, 80 Iowa, 626; s. c., 45 N. W. Rep. 1031. An Iowa statute authorizing municipal extension of limits, and providing that "no lands within said extended limits" not laid off into lots, etc., shall be taxed for city purposes, does not apply to extensions made before the passage of the act. *Perkins v. Burlington*, 77 Iowa, 553.

¹ *Maddrey v. Cox*, 73 Tex. 538. Municipal taxation of new territory not

dependent upon benefits. *Davis v. Point Pleasant*, 32 West Va. 289.

² *Smith v. Saginaw*, 81 Mich. 123; s. c., 45 N. W. Rep. 964. Contracts designed to operate through the city at large extend to and operate throughout the limits of the municipality subsequently enlarged. *St. Louis Gas Co. v. St. Louis*, 46 Mo. 121. After paying contracts had been made wards were added to a municipality, it being provided that the residents should not be liable for previous municipal debts, and it was held that there were no contract obligations between the contractors and the newly added residents. *United States v. Memphis*, 97 U. S. 284. See, also, *Cleveland v. Heisley*, 41 Ohio St. 670. The subject of narrowing the corporate limits, as related to previous debts, has also been a matter of discussion in various cases. In *State v. Comm'rs*, 41 Kan. 630, it was held that the liability for the debt attaches to the real estate of the county as soon as the bonds are legally issued, and the fact that the proceeds of the bonds had been expended when the change of boundary lines was made did not exempt the detached property from bearing its share of the debt; holding, also, that the fact that some of the territory was government land and not taxable when it was detached will not relieve it when it is no longer exempt. The new township formed from part of an old one is entitled to its share of the taxes assessed for the use of the original township. *Towle v. State*, 110 Ind. 120; s. c.,

§ 1403. The same subject continued.— The case of changes in municipal boundaries, by enlarging or contracting the limits or otherwise, is one which usually requires legislation for the adjustment of rights, for injustice might result from a failure of the legislature to provide for the changed conditions. Therefore the legislature apportions property and debts to do justice, as nearly as possible, to the inhabitants of the territory affected.¹

§ 1404. Equality and uniformity.— All taxation upon property must be apportioned with absolute uniformity within specific taxing districts, and to render taxation uniform in

10 N. E. Rep. 941. When territory is detached from a county and formed into a new county, the treasurer of the old county cannot be required to collect from the inhabitants of the new county taxes levied prior to the division. *State v. Clevenger*, 27 Neb. 422; s. c., 43 N. W. Rep. 243. *Contra*, *Fender v. Neosho Falls*, 22 Kan. 305.

¹*School District v. Board*, 73 Mo. 627; *Whitney v. Stowe*, 111 Mass. 368; *Harrison v. Bridgeton*, 16 Mass. 16; *Salem Turnpike v. Essex*, 100 Mass. 282; *Stone v. Charlestown*, 114 Mass. 214; *Bristol v. New Chester*, 3 N. H. 524; *Portwood v. Montgomery*, 52 Miss. 523; *Milwaukee v. Milwaukee*, 12 Wis. 93. As to the effect of detaching territory from a municipality previously indebted, see *Galesburg v. Hawkinson*, 75 Ill. 152, where it is held that it is unjust to the remaining tax-payers to withdraw real estate. This case also holds that the legislature cannot delegate its power to change boundaries to the courts. Territory brought in is liable to be taxed for existing municipal debts. *Olney v. Harvey*, 50 Ill. 453; *Watson v. Comm'rs*, 82 N. C. 17; *Stitz v. Indianapolis*, 81 Ind. 582. But so long as a corporation retains its legal identity, it will be entitled to retain its property and be liable for its

debts. *Milner v. Pensacola*, 2 Woods, 632; *Wade v. Richmond*, 18 Gratt. 583; *North Hemsted v. Hemsted*, 2 Wend. 109, 135; *Hartford Bridge Co. v. Hartford*, 16 Conn. 149, 171; *Windham v. Portland*, 4 Mass. 384; *Hampshire v. Franklin*, 16 Mass. 76, 85; *Montpelier v. East Montpelier*, 29 Vt. 12; *Olney v. Harvey*, 50 Ill. 453. The case of the division of towns and counties usually requires State apportionment. When one municipality is set off from another, the old one will, in the absence of statutory provisions, retain the public property and be liable for the corporate debts. It will also retain the right to collect the taxes previously voted, and such taxes will belong to it, though collected in part from the detached territory. *Morgan v. Hendricks*, 32 Ind. 234; *Dover v. McClinck*, 9 Watts & S. 80; *Waldron v. Lee*, 5 Pick. 323; *Harmon v. Marlborough*, 9 Cush. 525; *Moss v. Shear*, 25 Cal. 38. See, also, *Alvis v. Whitney*, 43 Ind. 83. And even though the tax be for a local work, the whole benefit of which will be received by the old municipality, the case will be the same. *Marion County v. Harvey County*, 26 Kan. 181. *Cf.* *Chandler v. Reynolds*, 19 Kan. 249; *Lamb v. Burlington*, 39 Iowa, 333.

any case two things are essential:—First, each taxing district must confine itself to the objects of taxation within its limits. Otherwise there may be double taxation. The second essential is that there should be uniformity in the manner of assessment, and approximate equality in the amount of exactions within the district; and all objects of taxation within the district should be embraced.¹ Perfect equality in taxation is, however, unattainable, and there are many difficulties in all attempts at equal taxation.² If a tax reaches all of a class of persons or things, and there is no discrimination between the individuals of the class taxed, the element of uniformity is satisfied.³

§ 1405. The same subject continued.—The legislature has the power to prescribe not only the property to be taxed, but the rule by which it must be taxed, and the only limitation of that power is that the rule shall be uniform.⁴ The rule of uniformity extends to cities, towns and counties as well as to State taxation; but local taxes may be levied on different systems in different districts.⁵ A State constitutional provision as to equality and uniformity does not pre-

¹Cooley's Const. Lim. (6th ed.), pp. 610–633.

²See, for elaborate discussions of this subject, Gibson, C. J., in Kirby v. Shaw, 19 Pa. St. 258, 260; Bigelow, C. J., in Commonwealth v. Bank, 5 Allen, 428, 436; Williams' Case, 3 Bland Ch. 186, 220.

³Ould v. Richmond, 23 Gratt. 464; St. Louis v. Steinberg, 69 Mo. 289; Merriam v. New Orleans, 14 La. Ann. 318; New Orleans v. Kauffman, 29 La. Ann. 283; New Orleans v. Steiger, 11 La. Ann. 68; American Union Exp. Co. v. St. Joseph, 66 Mo. 675; Glasgow v. Rowse, 43 Mo. 479; Ottawa Comm'rs v. Nelson, 19 Kan. 234. Taxation must be equal, uniform and *ad valorem*, except as to incomes, licenses and capitation. Peters v. Lynchburg, 76 Va. 927; s. c., 3 Am. & Eng. Corp. Cas. 475; Schoolfield's Ex'r v. Lynchburg, 78

Va. 366; s. c., 8 Am. & Eng. Corp. Cas. 488.

⁴Wisconsin &c. R. Co. v. Taylor, 52 Wis. 43.

⁵State v. Hannibal &c. R. Co., 75 Mo. 212; Hale v. Kenosha, 29 Wis. 599; Knowlton v. Supervisors, 9 Wis. 410; People v. Central Pac. R. Co., 43 Cal. 398. See, also, Gilman v. Sheboygan, 2 Black, 510. In Indiana and Louisiana a constitutional requirement of uniformity has no reference to municipal taxes. Richmond v. Scott, 48 Ind. 568; Loftin v. Citizens' Bank, 85 Ind. 346; Louisiana v. Pilsbury, 105 U. S. 291; Municipality v. Duncan, 2 La. Ann. 182; Lafayette v. Cummins, 3 La. Ann. 673; Selby v. Comm'rs, 14 La. Ann. 434; Bishop v. Marks, 15 La. Ann. 147; Yeatman v. Crandall, 11 La. Ann. 220; Surgi v. Snetchman, 11 La. Ann. 387. Cf. Douglas v. Har-

clude the imposition by a municipality of a tax on business, nor a tax on one class of business and not on another.¹

§ 1406. The same subject continued — Limitation of the rule.—The provisions of a constitution as to equality and uniformity apply to property alone and not to taxes on privileges and occupations.²

risville, 9 West Va. 162. But the constitution of Texas, which contains the same provision as the constitution of Louisiana, is held to control municipal as well as State taxation. *Austin v. Austin Gas-light Co.*, 69 Tex. 180. See, also, *New Orleans v. Elliott*, 10 La. Ann. 59.

¹ *Cutliff v. Albany*, 60 Ga. 597; *Davis v. Macon*, 64 Ga. 133; *Johnston v. Macon*, 62 Ga. 645. See, also, *Frommer v. Richmond*, 31 Gratt. 646; *Trustees v. McConnell*, 12 Ill. 138; *Western Union Tel. Co. v. State*, 55 Tex. 314; *Texas & Co. v. State*, 42 Tex. 639; *Carter v. Dow*, 16 Wis. 298; *Baker v. Cincinnati*, 11 Ohio St. 534.

² *Gatlin v. Tarboro*, 78 N. C. 119; *Washington v. State*, 13 Ark. 752; *Egyptian Sewer Co. v. Hardin*, 27 Mo. 495; *McGehee v. Mathis*, 21 Ark. 40; *People v. Coleman*, 4 Cal. 46; *Bohler v. Schneider*, 48 Ga. 195; *Glasgow v. Rowse*, 43 Mo. 479; *Western Union Tel. Co. v. Thayer*, 28 Ohio St. 537; *Walters v. Duke*, 31 La. Ann. 668; *Boy v. Girardey*, 28 La. Ann. 717. *Ex parte Robinson*, 12 Nev. 263; *Howe Ins. Co. v. Augusta*, 50 Ga. 530; *Slaughter's Case*, 13 Gratt. 767; *Eyre v. Jacob*, 14 Gratt. 422; *Adams v. Somerville*, 2 Head (Tenn.), 363; *Texas Insurance Co. v. State*, 42 Tex. 636; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Walker v. Springfield*, 94 Ill. 364; *St. Louis v. Green*, 7 Mo. App. 468. See, also, *Young v. Henderson*, 76 N. C. 420. An exemption clause in a constitution renders it imperative that all private property not exempt shall be taxed, whether the tax is for municipal or State purposes. *Hill v. Ogden*, 5 Ohio St. 246; *Zanesville v. Richards*, 5 Ohio St. 589. A levy by a municipality of two per cent. on real estate, excluding from valuation and taxation the stocks of goods of merchants, is not uniform. *London v. Wilmington*, 78 N. C. 109. Where taxable property in a city is exempted from taxation, with the design of benefiting the city by increasing its business and population, and the taxes on other property in the city are thereby increased, such taxes are illegal and uncollectible. *Weeks v. Milwaukee*, 10 Wis. 242; *Kittle v. Sherwin*, 11 Neb. 65; s. c., 7 N. W. Rep. 863. Where a merchant's privilege is taxed, no discrimination can be made between those living within and those residing without the city. *Nashville v. Althrop*, 5 Cold. (Tenn.) 554. *Cf. Robinson v. Charleston*, 2 Rich. 317. An exemption of the property of non-residents is unconstitutional as violating the rule of equality and uniformity. *Marion & Co. R. Co. v. Champlin*, 37 Kan. 682. On the general subject see *Commonwealth v. Delaware Canal Co.*, 123 Pa. St. 594; s. c., 25 Am. & Eng. Corp. Cas. 348; *Verderer v. Village*, 82 Ga. 138; s. c., 23 Am. & Eng. Corp. Cas. 358; *Daly v. Morgan*, 69 Md. 460; s. c., 23 Am. & Eng. Corp. Cas. 454; *Livingston v. Paducah*, 80 Ky. 656; s. c., 3 Am. & Eng. Corp. Cas. 573;

§ 1407. **Taxation to pay debts.**—A municipal debt is often the first step in taxation, the levy of taxes being the only means of paying the debt. If a municipality refuses to pay a debt, the State may, so far as such refusal is a public wrong, levy a tax, by State agencies if necessary, upon the property of the municipality, or compel the municipality to levy it, sufficient to meet the obligation.¹

§ 1408. **The same subject continued.**—But the power may be limited, “and there is much good reason for assenting also to what several respectable authorities have held, that when a demand is asserted against a municipality, though of a nature that the legislature would have a right to require it to receive and discharge, yet if its legal and equitable obligation is disputed, the corporation has the right to have the dispute settled by the courts, and cannot be bound by a legislative allowance of the claim.”²

Danville v. Shelton, 76 Va. 325; s. c., 3 Am. & Eng. Corp. Cas. 458.

¹*Dunovan v. Green*, 57 Ill. 63; *Guilford v. Supervisors of Chenango*, 18 Barb. 615; s. c., 13 N. Y. 143; *New Orleans v. Clark*, 95 U. S. 644; *Sinton v. Ashbury*, 41 Cal. 525, 530; *Beals v. Amador County*, 35 Cal. 624; *Sharp v. Contra Costa County*, 34 Cal. 284; *People v. McCreery*, 34 Cal. 432; *People v. Alameda*, 26 Cal. 641; *People v. Supervisors*, 11 Cal. 206; *Borough of Dunmore's Appeal*, 52 Pa. St. 374; *Layton v. New Orleans*, 12 La. Ann. 515; *Burns v. Clarion County*, 62 Pa. St. 422; *People v. Flagg*, 46 N. Y. 401; *People v. Power*, 25 Ill. 187; *Waterville v. County Comm'rs*, 59 Me. 80. The legislature may validate an unauthorized issue of bonds. *Read v. Plattsmouth*, 107 U. S. 568. An act cannot create a liability, but may provide for enforcing a pre-existing liability. *Supervisors v. Cowan*, 60 Miss. 876. Nor bestow a gratuity. *Fuller v. Morrison County*, 36 Minn. 309. See *Caldwell County v. Har-*

bert, 68 Tex. 321; *State v. Foley*, 30 Minn. 350; *Creighton v. San Francisco*, 42 Cal. 446; *Youngblood v. Sexton*, 32 Mich. 406; *Meriwether v. Garrett*, 102 U. S. 472; *Meyer v. Brown*, 65 Cal. 583; *Shelley v. St. Charles County*, 30 Fed. Rep. 603; *Munday v. Rahway*, 43 N. J. Law, 338; *Lilly v. Taylor*, 88 N. C. 489; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

²*Cooley's Const. Lim.*, p. 286. It has been held that the legislature has no right to direct a municipality to pay a claim for damages for breach of contract out of the corporate funds or property. *People v. Hawes*, 37 Barb. 440. The court cited *Guilford v. Supervisors*, 13 N. Y. 143; *People v. Supervisors*, 11 Abb. 114, and *People v. Mayor &c. of Brooklyn*, 4 N. Y. 419, which hold that the State may compel the levy of taxes to pay claims against municipalities, but draws a distinction between taxing to pay such debts and paying the claims out of the corporate funds or property. This decision (*People v.*

§ 1409. The same subject continued — Implied duties.— The power of the municipality to make contracts and create liabilities imposes the duty to provide for the payment of obligations and liabilities. If no special mode of payment is prescribed by law a tax must be collected to satisfy the claims of creditors;¹ and if the existing law or any law adopted for the purpose requires the municipality itself to levy the tax, the officers may be compelled by *mandamus* to make the levy.²

§ 1410. Implied duties further considered.— In contracting a debt a municipality impliedly contracts to employ its taxing powers to ratify the obligation.³ This principle does not apply where there are other means than taxation provided for paying the debt;⁴ nor to compel the levy of a tax to pay a judgment recovered against a town which had no express charter power of taxation.⁵

§ 1411. Limitation of State control.— The powers which a municipality had when the debt was contracted cannot

Hawes, 37 Barb. 440) seems opposed to the decision in the Borough of Dunmore's Appeal, 52 Pa. St. 374. *Cf.* Baldwin v. Mayor &c. of New York, 42 Barb. 549; *In re* Pennsylvania Hall, 5 Pa. St. 204; Layton v. New Orleans, 12 La. Ann. 515; People v. Power, 25 Ill. 187; Portwood v. Montgomery County, 52 Miss. 523.

¹Commonwealth v. Alleghany County (1860), 37 Pa. St. 277; Commonwealth v. Pittsburgh (1859), 34 Pa. St. 446; United States v. New Orleans (1878), 98 U. S. 381. When the power to levy taxes for general purposes was expressly limited, an authority to contract debts beyond that amount for special purposes was held not to imply an authority to levy taxes to pay such special debts. State v. Guttenburg (1877), 38 N. J. Law, 419. See Macon County Case, 99 U. S. 582.

²Commonwealth v. Pittsburgh

(1859), 34 Pa. St. 496; Whiteley v. Lansing, 27 Mich. 131; Morgan v. Commonwealth, 55 Pa. St. 456; Robinson v. Supervisors, 43 Cal. 353; Nelson v. St. Martins, 111 U. S. 716.

³Sibley v. Mobile, 3 Woods, 535; State v. Police Jury, 34 La. Ann. 673; Von Hoffman v. Quincy, 4 Wall. 535; Riggs v. Johnson, 6 Wall. 166; United States v. New Orleans, 98 U. S. 391; Kelley v. Milan, 127 U. S. 139, 150; Norton v. Dyersburg, 127 U. S. 160; Galena v. Amy, 5 Wall. 705; Loan Association v. Topeka, 20 Wall. 655; Rees v. Watertown, 19 Wall. 117; United States v. Macon County, 99 U. S. 582; Wolff v. New Orleans, 103 U. S. 358; Ralls County &c. v. United States, 105 U. S. 733.

⁴United States v. New Orleans, 2 Woods, 230; Water Comm'rs v. East Saginaw, 33 Mich. 164.

⁵State v. Maysville, 12 S. C. 76.

subsequently be lessened to the prejudice of the creditor.¹ Even if the State sympathizes with the debtor municipality, and attempts to aid it by limiting its power to tax so that the corporate debts cannot be paid by taxes raised within the legal limits, the courts will hold that such limitation of the taxing power was an impairment of the obligation of contracts. Where the State has conferred the power to create debts and to levy taxes for their satisfaction, it impliedly contracts with those who become creditors that the power so conferred shall not be restricted to their prejudice while their demands remain unpaid.²

§ 1412. The same subject continued — Rules of construction.—Where contracts are made under a settled construction of the constitution by the judiciary, they cannot afterwards be invalidated by a change in such construction,³ or by any change in the constitution itself.⁴

¹ *Brodie v. McCabe*, 33 Ark. 690; *Silly v. Taylor*, 88 N. C. 489; *Goodale v. Fennell*, 27 Ohio St. 426. But the State may, by subsequent legislation, legalize a contract *ultra vires* when made, and enforce performance on the part of the municipality. *Cooley's Const. Lim.* (6th ed.), p. 467. But see *Hasbrouck v. Milwaukee*, 13 Wis. 37.

² *Von Hoffman v. Quincy*, 4 Wall. 535; *Galena v. Amy*, 5 Wall. 705; *Riggs v. Johnson County*, 6 Wall. 166; *Rees v. Watertown*, 19 Wall. 109; *United States v. Jefferson County*, 5 Dill. 310; *Sibley v. Mobile*, 3 Woods, 535; *Brodie v. McCabe*, 33 Ark. 690. The Tennessee acts enacted with a view to compel the compromise of municipal indebtedness by the bondholders are, under the inhibition of the federal constitution against impairing the obligation of contracts, unconstitutional and void, in so far as they repeal the corporate powers of taxation conferred as a part of the remedy of the creditors. *Devereaux v. City of Brownsville*, 29

Fed. Rep. 742. Any taxes levied by the legislature for municipal purposes, or grants of power to a municipality to make such levies, may be repealed, if they are subsequent to the contract involved, as there is no protection under the federal constitution except for such powers of taxation as enter into and become a part of the contract itself, and belong as a remedy to the creditor of the municipality. *Devereaux v. Brownsville*, *supra*.

³ *Douglass v. Pike County*, 101 U. S. 677; *Gelpcke v. Dubuque*, 1 Wall. 175; *Olcott v. Supervisors*, 16 Wall. 678.

⁴ *White v. Hart*, 13 Wall. 646; *Opinions of Justices*, 58 N. H. 623. But where, at the time the contract is made, only realty is taxable for payment of the obligation, a subsequent extension to embrace personality is a mere gratuity, and may be repealed. *Foot v. Howard County &c.*, 1 McCràry, 218. The power which has been conferred to con-

§ 1413. **Other limitations of taxing power.**—Where a bonded debt is authorized and the power of taxation is limited to the special tax designated in the act, there is no power to levy a greater tax than the one thus specially limited; and if there is no statute giving power to issue bonds, the municipality cannot be compelled to raise a tax to pay them.¹ So, a municipality cannot raise a tax to pay indebtedness, unless it has express or implied power to levy a tax for that purpose.²

§ 1414. **The same subject continued.**—In *United States v. Macon County Court*,³ the court said:—“Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond the municipality is not bound. So, too, if the municipality has no power, either by express grant or by

tract a debt in aid of a railroad may be taken away at any time before the debt is contracted, even though the people have voted the aid; and a subscription made by the municipal officers after the power has been taken away is void. *Lieb v. Wheeling*, 7 West Va. 501. See, also, *Railroad &c. Co. v. Gaines*, 97 U. S. 697. The statutory right to damages for injury from a mob is not founded on contract; and if after the recovery of the judgment the rate of taxation that may be levied for its payment is changed, the federal courts cannot interfere. *Louisiana v. New Orleans*, 109 U. S. 285. Where a village, after a cause of action has accrued against it, reorganizes under a general act, thereby obtaining the right to levy taxes at a higher rate than before, and the cause of action is then reduced to judgment, the village may levy taxes at the higher rate to pay such judgment, where the statutes provide that the liabilities of corporations are not released by reorganization. *Carney v. Village of Mar-sailles*, 136 Ill. 401; s. c., 26 N. E. Rep. 491.

¹ *United States v. Clark County*, 96 U. S. 212; *United States v. Macon County Court*, 99 U. S. 582; *McPherson v. Foster* (1876), 43 Iowa, 48; *People v. Jackson*, 92 Ill. 444; *Sykes v. Columbus*, 55 Miss. 115; *Williamson v. Keokuk* (1876), 44 Iowa, 88; *State v. Macon County*, 68 Mo. 29; *Aspinwall v. Comm'rs*, 22 How. 364; *Marsh v. Fulton County* (1870), 10 Wall. 676; *Bissell v. Kankakee* (1872), 64 Ill. 249; *Knox County Court v. United States*, 109 U. S. 229; *Chicot County v. Kruse*, 47 Ark. 80. See, also, *East St. Louis v. United States*, 110 U. S. 321; *Clay County v. McAleer*, 115 U. S. 616. A subsequent constitutional provision was held to remove a prior charter limitation on the power of a council to levy a tax for the payment of bonded debt thereafter incurred. *East St. Louis v. Amy*, 120 U. S. 600.

² *United States v. Macon County Court*, 99 U. S. 582; *State v. Guttenberg*, 39 N. J. Law, 660; *M. E. Church, In re* (1876), 66 N. Y. 395.

³ 99 U. S. 582.

implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. . . . We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers.”¹ But in *United States v. New Orleans*,² it was held that when a municipal corporation has been vested with authority to borrow money or incur an obligation in order to execute a public work, it has power to raise by taxation the money to discharge the obligation, without any special mention of the power to do so, unless the implication of such power is repelled by other provisions in the charter or other legislative enactments.³

§ 1415. Effect of annulling the municipal charter.—No subsequent change in the municipal boundaries, or in the organization or powers of the municipality, short of the entire destruction of the corporation, can affect the right of creditors to proceed against the municipality or its officers.⁴ But if the State should take away altogether the corporate powers of the debtor municipality, and create instead one or more entirely new corporations, which should be, not successors to the old bodies under new names, but new and distinct creations, the creditors might be without remedy, as taxation could not be enforced under the old law after the corporations ceased to exist.⁵ It has also been held that the property

¹See, also, *Harshman v. Knox County Court*, 122 U. S. 306; *Brownsville Comm'rs v. Loague*, 129 U. S. 493.

²98 U. S. 391.

³See, also, *United States v. Lincoln County*, 5 Dill. 184. *Mandamus* has been employed to compel the levy of a tax to the full limit in force when the debt was created, notwithstanding a subsequent constitutional restriction on the amount of taxes which might be levied. *Fisk v. Jefferson &c. Jury*, 116 U. S. 131. *Cf. East St. Louis v. Amy*, 120 U. S. 800.

⁴*State v. New Orleans*, 34 La. Ann. 1149; *United States v. Port of Mobile*, 4 Woods, 536; *Decatur County*

Board v. State, 86 Ind. 8. See, also, *Robinson v. Butte County*, 43 Cal. 353. When a special tax is authorized for a particular demand, and it is inadequate to the purpose, payment from the general fund may be compelled. *United States v. Clark County*, 95 U. S. 769; *Knox County Court v. United States*, 109 U. S. 229. See, also, *Foote v. Howard County Court*, 4 McCrary, 218. Confederating to prevent the collection of a tax to pay a judgment may be actionable. *Findlay v. McAllister*, 113 U. S. 104.

⁵*Meriwether v. Garrett*, 102 U. S. 472. See, also, *Cooley on Taxation*, p. 78.

of the individuals of the defunct corporations could not by judicial proceedings be subjected to the payment of the old debts. Also that all corporate property held for public use would pass, when the corporation ceased to exist, under the immediate control of the State. Even taxes levied before the repeal of the charter could only be collected under legislative authority, and in the absence of such authority the remedy of the creditors would be an appeal to the legislature.¹

§ 1416. *Mandamus*.—The duty of the municipality to provide for the payment of liabilities may, in all proper cases, be enforced by *mandamus*.² It has been generally held that if the creditor may bring suit against the corporation and obtain judgment, which may be enforced by ordinary execution, *mandamus* will not lie to compel payment in advance of judgment recovered.³

§ 1417. *The same subject continued*.—In New Jersey *mandamus* is the remedy where the ordinary process of exe-

¹ *Meriwether v. Garrett*, 102 U. S. 472; *Luehrman v. Taxing District*, 2 Lea, 425. See, also, *Uhl v. Taxing District*, 6 Lea, 610.

² *Commonwealth v. Pittsburgh* (1859), 34 Pa. St. 496, 510; *Walkley v. Muscatine*, 6 Wall. 481; *Davenport v. Lord*, 9 Wall. 409; *Heine v. Sewer Comm'rs* (1873), 19 Wall. 655; *Reese v. Watertown* (1873), 19 Wall. 107; *Young v. Clarendon* (1889), 132 U. S. 340; *Commonwealth v. Perkins*, 43 Pa. St. 400; *Craddock v. Graham* (1859), 2 Met. (Ky.) 56; *Lexington v. Mulliken* (1856), 7 Gray, 280; *State v. Milwaukee* (1865), 20 Wis. 87; *Pegram v. Cleveland County Comm'rs* (1870), 64 N. C. 557; *Soutter v. Madison*, 15 Wis. 30; *Hawley v. Fayetteville Comm'rs*, 83 N. C. 22; *Kennedy v. Sacramento*, 19 Fed. Rep. 580. In New England the remedy is not by *mandamus* but by execution against the private property of any individual member of the municipal corporation. *School District v. Wood*, 13

Mass. 192; *Beardsley v. Smith*, 16 Conn. 375; *Gaskill v. Dudley*, 6 Met. 546; *Eames v. Savage*, 77 Me. 212; *Hawkes v. Kennebec*, 7 Mass. 461; *Chase v. Merrimac Bank*, 19 Pick. 564; *Bloomfield v. Charter Oak Bank*, 121 U. S. 129; *Hill v. Boston*, 122 Mass. 344.

³ *State v. Floyd County Judge*, 5 Iowa, 380; *Coy v. Lyons*, 17 Iowa, 1; *People v. Clark County Supervisors* (1869), 50 Ill. 213; *State v. Davenport*, 12 Iowa, 335; *Knapp v. Hoboken*, 38 N. J. Law, 371; *State v. Clay County* (1870), 46 Mo. 231; *State v. New Orleans*, 30 La. Ann. 129, 82; *State v. Little Valley* (1876), 64 N. Y. 112; *People v. New York Board &c.* (1876), 64 N. Y. 627; *Mansfield v. Fuller* (1872), 50 Mo. 338. *Cf.* *Buck v. Lockport* (1872), 6 Lansing (N. Y.), 251. See, also, *Klein v. Warren Supervisors*, 51 Miss. 878; *Klein v. Smith Supervisors*, 54 Miss. 254; *Newman v. Scott &c.* (Tenn.), 1 Heisk. 787; *Gunn's Adm'r v. Pulaski County*, 3

cution is inadequate.¹ In California when a money judgment is recovered against a county no execution can issue; but the board of supervisors can be compelled by *mandamus* to audit the claim;² while in Iowa the remedy against a county and upon ordinary municipal indebtedness is by suit and not by *mandamus*, when the indebtedness is in the original form, as a simple contract debt.³

§ 1418. The same subject continued—Implied obligations to levy tax.—Though a municipality cannot exceed a limitation imposed by the legislature, and can only be compelled to exercise the powers conferred upon it by the laws of the State, yet a creditor is entitled to have the *whole power of the corporation* exerted for the payment of a judgment;⁴ and where a city council has a discretion as to the amount of tax which it is authorized to levy for *ordinary purposes*, it must, if necessary, exercise all the power which it has to pay a judgment obtained against the municipality.⁵ So, though a legislative act is merely permissive in its language, the United States Supreme Court has held that a power thus given is mandatory and imposes a positive and absolute duty, if its exercise is necessary in order to pay judgments rendered

Ark. 427; *Vance v. Little Rock* (1875), 30 Ark. 435.

¹ *State v. Guttenberg*, 39 N. J. Law, 660. For the law in Wisconsin, see *Crane v. Fond du Lac* (1862), 16 Wis. 196; *State v. Milwaukee Council*, 20 Wis. 87; *State v. Beloit Supervisors*, 20 Wis. 79; *State v. Madison Council*, 15 Wis. 30.

² *Alden v. Alameda County* (1872), 43 Cal. 270.

³ *State v. County Judge*, 5 Iowa, 380; *Coy v. Lyons*, 17 Iowa, 1; *State v. Davenport*, 12 Iowa, 335. For the Alabama law, see *Miller v. McWilliams* (1874), 50 Ala. 427; *Elmore County v. Long* (1875), 52 Ala. 277; *Covington County v. Dunklin* (1875), 52 Ala. 28. Also, *Shinbone v. Randolph County*, 56 Ala. 183. In Pennsylvania it is held that an ordinary execution cannot be issued against a

municipal corporation, and that the proper remedy of the creditor is the *mandamus execution* provided for by statute. *Monaghan v. Philadelphia* (1857), 28 Pa. St. 207; *Commonwealth v. Pittsburgh*, 88 Pa. St. 66. The remedy against a *county* in Pennsylvania is sometimes by action and sometimes by *mandamus*. *Commonwealth v. Alleghany Comm'rs*, 16 Serg. & R. (Pa.) 317; *Lyon v. Adams*, 4 Serg. & R. (Pa.) 443; *Wilson v. Huntington Comm'rs*, 7 Watts & S. (Pa.) 197.

⁴ *Butz v. Muscatine* (1869), 8 Wall. 575; *Coy v. Lyons* (1864), 17 Iowa, 1; *Commonwealth v. Pittsburgh* (1859), 34 Pa. St. 496.

⁵ See cases cited in preceding note, and also *Iowa Railroad & Co. v. Sac County* (1874), 39 Iowa, 124.

against the municipality.¹ In all cases the rights and remedies of municipal creditors must be considered with reference to the legislation under which the debts were created. If the legislature authorizes the creation of a debt and provides no special mode for its payment, it must be inferred that the debt is to be paid by taxation for that purpose, if there is nothing to rebut such intention.²

§ 1419. *Mandamus after judgment.*—Where a municipal corporation is authorized to create a specific debt and levy a tax to pay the principal and interest, a *mandamus* is the proper remedy of the creditor to compel the payment of the principal or interest;³ and where there is a duty to levy a special tax to pay a specified class of debts, and there is no valid defense claimed, and there is no question as to the genuineness of the evidences of debt which are held by the relator, it has been held that a prior judgment was not essential to give the right to a *mandamus* to compel the collection of the tax. But if there is any doubt as to the validity of the debt, the court will only grant the writ of *mandamus* to enforce a judgment obtained;⁴ and in the federal courts a municipal bondholder must resort to law and obtain judgment to establish the va-

¹ *Rock Island Supervisors v. United States* (1866), 4 Wall. 435; *Robinson v. Butte Supervisors* (1872), 43 Cal. 353; *State v. New Orleans*, 30 La. Ann. 129; *Memphis v. Brown* (1877), 97 U. S. 300; *United States v. Memphis* (1877), 97 U. S. 284; *Memphis v. United States* (1877), 97 U. S. 293. See, also, *People v. Albany Supervisors*, 12 Johns. 416.

² *United States v. New Orleans*, 98 U. S. 391; *Kelley v. Milan*, 127 U. S. 139, 150; *Norton v. Dyersburg*, 127 U. S. 160.

³ *Walkley v. Muscatine*, 6 Wall. 481; *State v. Comm'rs*, 6 Ohio St. 280; *Flagg v. Palmyra*, 33 Mo. 440; *Von Hoffman v. Quincy*, 4 Wall. 535; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Rock Island v. United States*, 4 Wall. 435; *Riggs v. Johnson County*, 6 Wall. 166; *Davenport v. Lord*, 9

Wall. 409; *Knox Comm'rs v. Aspinwall*, 24 How. 384; *Washington Supervisors v. Durant*, 9 Wall. 415.

⁴ *Commonwealth v. Comm'rs*, 37 Pa. St. 277; *Columbia Comm'rs v. King*, 13 Fla. 451; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Maddox v. Graham*, 2 Met. (Ky.) 56; *State v. Clinton*, 6 Ohio St. 280; *Rahway v. Rahway*, 49 N. J. Law, 384. *Cf. State v. Davenport*, 12 Iowa, 335; *People v. Brown*, 55 N. Y. 180; *Pegram v. Cleveland County*, 64 N. C. 557; *Winslow v. Perquimans County*, 64 N. C. 218; *Brown v. Crego*, 32 Iowa, 498; *Stevenson v. Summit*, 35 Iowa, 462; *Shinbone v. Randolph County*, 56 Ala. 183; *State v. Milwaukee*, 20 Wis. 87; *Newman v. Justices*, 5 Sneed (Tenn.), 695; *State v. Anderson County*, 8 Baxt. (Tenn.) 249.

lidity and amount of his debt. In such cases a federal court cannot issue a *mandamus* as an original proceeding.¹ A *mandamus* thus issued by the federal court takes the place of a writ of execution issued by the State courts, and the State courts cannot interfere with it.²

§ 1420. Proceedings in equity.—In general, it is only necessary before proceeding by *mandamus* that the amount of the demand shall be conclusively fixed and determined, and that it is the present duty of the municipality to provide for it;³ but the federal Supreme Court has decided that equity jurisdiction should not be exercised to compel the payment of a judgment in favor of a bondholder which the writ of *mandamus* had failed to enforce, since the court regarded *mandamus* as the regular and appropriate remedy.⁴

§ 1421. When mandamus is improper.—When the public interest conflicts with private interests the latter must yield. So if the entire fund which can be raised by taxation is required to meet the necessary expenses of the municipal government, economically administered, and none can be di-

¹ Bath County v. Amy, 13 Wall. 244; Heine v. Levee Comm'rs, 19 Wall. 655; Queensbury v. Culver, 19 Wall. 83, 92; Davenport v. Dodge County, 105 U. S. 237.

² Riggs v. Johnson County, 6 Wall. 166; United States v. Keokuk, 6 Wall. 514; Mayor v. Lord, 9 Wall. 409; Clews v. Lee County, 2 Woods, 474; Hawley v. Fairbanks, 108 U. S. 543; United States v. Silverman, 4 Dill. 224. As to proceedings in the federal courts, see, also, Dillon on Munic. Corp. (4th ed.), § 856, and Cooley on Taxation (2d ed.), p. 744.

³ State v. New Orleans, 34 La. Ann. 477; Nelson v. St. Martins, 111 U. S. 716; Dayton v. Rounds, 27 Mich. 82; Schoolbred v. Charleston, 2 Bay, 63; Wilkinson v. Cheatham, 43 Ga. 258; Clark County Court v. Turnpike Co., 11 B. Mon. (Ky.) 143; Rodman v. Justices, 3 Bush, 144; People v. Su-

pervisors, 10 Wend. 363; Robinson v. Supervisors, 43 Cal. 353; People v. Supervisors, 51 N. Y. 401; State v. Smith, 11 Wis. 65; People v. Bennett, 54 Barb. 480; Cass v. Dillon, 16 Ohio St. 38; Columbia County v. King, 13 Fla. 451; State v. Harris, 17 Ohio St. 608; United States v. Sterling, 2 Biss. 408; United States v. School Dist., 20 Fed. Rep. 294; Gardner v. Haney, 86 Ind. 17; Commonwealth v. Council of Pittsburg, 88 Pa. St. 66; State v. Board of Education, 27 Ohio St. 96; East St. Louis v. Zebbley, 110 U. S. 321.

⁴ Walkley v. Muscatine, 9 Wall. 481; Rees v. Watertown, 19 Wall. 107; Heine v. Comm'rs, 19 Wall. 655; Barkley v. Comm'rs, 93 U. S. 258; Thompson v. Allen County, 115 U. S. 550. Cf. Mount Pleasant v. Beckwith, 100 U. S. 514.

verted without serious detriment to the public, none ought to be appropriated to pay debts. The municipal officers cannot be compelled to levy a tax in excess of the legal limitation.¹ It is always the duty of a prospective municipal debtor to ascertain the powers which the municipality has, and if he fails to do so, he cannot by *mandamus* compel the municipal officers to exceed their power.²

§ 1422. **Execution.**—Municipal corporations may sometimes own some kinds of property strictly private, or an interest in such property, or have debts of a strictly private nature due them; and when such property, owned for profit, is not charged with any public trust or use, it is in some States held to be subject to levy and sale on execution like the property of individuals.³ In other States, either by statutory law or judicial decisions, it is declared that the remedy of creditors is

¹ *United States v. Macon County*, 99 U. S. 582; *Ralls County Court v. United States*, 105 U. S. 733; *Sparland v. Barnes*, 98 Ill. 595; *East St. Louis v. Zebley*, 110 U. S. 321; *Cope v. Collins*, 37 Ark. 649; *Sibley v. Mobile*, 3 Woods, 535; *Cromartie v. Comm'rs*, 87 N. C. 134; *East St. Louis v. Trustees*, 6 Ill. App. 130; *Clifton v. Wynne*, 80 N. C. 145. The legal limitation of a county tax is not a limitation of town taxes. *Wabash &c. R. Co. v. McCleave*, 108 Ill. 368.

² *East St. Louis v. Zebley*, 110 U. S. 321; *United States v. Macon County*, 99 U. S. 582. A statute authorizing a court to order a levy to pay a judgment is not controlled by a statute limiting the municipal tax rate. *Shields v. Chase*, 32 La. Ann. 409. Where the statute authorizing a *mandamus* is repealed after the writ has issued, the writ must nevertheless be enforced. *Memphis v. United States*, 97 U. S. 293. The court may decide what objects shall be included in the levy under such writ. *Memphis v. Brown*, 97 U. S. 300. If there is a lack of evidence to prove contract

obligations, as distinguished from mere acknowledgments of debt, *mandamus* will not lie to compel taxation in excess of the legal limitation. *Favrot v. East Baton Rouge*, 34 La. Ann. 491. The writ will not be granted unless there appears to be no other adequate remedy. *Hitchcock v. Galveston*, 4 Woods, 308. Where a municipality has been abolished by law and the State has assumed the winding up of its affairs, *mandamus* will not lie to enforce the payment by it of a pre-existing debt. *Meriwether v. Garrett*, 102 U. S. 472.

³ *Brown v. Gates*, 15 West Va. 181; *Holladay v. Frisbie*, 15 Cal. 630; *Davenport v. Peoria &c. Co.*, 17 Iowa, 276; *Louisville v. Commonwealth*, 1 Duvall (Ky.), 295; *Birmingham v. Rumsey*, 63 Ala. 352; *Hart v. New Orleans*, 12 Fed. Rep. 292. See, also, *New Orleans v. Morris*, 3 Wood's C. C. 103; *New Orleans v. Home Ins. Co.*, 23 La. Ann. 61; *New Orleans v. Morris*, 105 U. S. 600. Judgments against a county which has no private property must be enforced by *mandamus*. *Gooch v. Gregory*, 65 N. C. 142.

by *mandamus* and not by execution. The question is, for the most part, settled by legislation.¹ In recovery by *mandamus* the plaintiff is not restricted to any particular property or revenues, or subject to any conditions, unless the judgment or statute so provides.² In the absence of statute there can be no mechanic's lien against property used for public purposes. The mechanic's remedy is by *mandamus* to compel payment, or the levy of a tax for the purpose.³

§ 1423. **Legislative control.**—The legislature has no power to restrict the taxing power of a municipality so as to prevent it from fulfilling obligations into which it has already entered,⁴ nor to compel a municipality against its will to contract debts for local purposes in which the State is not concerned, or to assume obligations not within the ordinary functions of municipal government. The corporators have the same right to determine such matters that the members of private corporations have to determine for themselves the questions which arise for their corporate action. The State may, in such cases, remove restrictions and permit action, but cannot compel it.⁵

¹ *Commonwealth v. Allegheny County*, 37 Pa. St. 277; *Commonwealth v. Perkins*, 43 Pa. St. 400; *State v. Milwaukee*, 20 Wis. 87; *Crane v. Fond du Lac*, 16 Wis. 196; *Chicago v. Halsey*, 25 Ill. 595; *Olney v. Harvey*, 50 Ill. 453; *Bloomington v. Brokaw*, 77 Ill. 194; *Cairo v. Allen*, 3 Ill. App. 398; *Morrison v. Hickson*, 87 Ill. 587; *Klein v. New Orleans*, 99 U. S. 149; *Curry v. Savannah*, 64 Ga. 290.

² *United States v. New Orleans*, 98 U. S. 381.

³ *Gooch v. Gregory*, 65 N. C. 142; *Leonard v. Brooklyn*, 71 N. Y. 498; *Commissioners v. O'Conner*, 86 Ind. 531; *Foster v. Fowler*, 60 Pa. St. 27; *Winslow v. Comm'rs*, 64 N. C. 218; *Eldred v. Bernadotte*, 53 Ill. 368; *Bloomington v. Brokaw*, 77 Ill. 194; *Morrison v. Hickson*, 81 Ill. 587; *Curry v. Savannah* (1879), 64 Ga. 290; *Chadwick v. Colfax*, 51 Iowa, 70; *Board &c.*

v. Neidenberger, 78 Ill. 58; *Klein v. New Orleans*, 99 U. S. 149. In Louisiana it was held that a jail could be sold under a mechanic's lien, but not the ground on which it stood. *McKnight v. Parish*, 30 La. Ann. 361. For a construction of the statutory law in New York, see *Bell v. New York*, 105 N. Y. 139.

⁴ *Von Hoffman v. Quincy*, 4 Wall. 588; *Wolff v. New Orleans*, 103 U. S. 358; *Gilman v. City of Sheboygan*, 2 Black, 510; *Lansing v. Treasurer*, 1 Dill. 522; *Goodale v. Fennell*, 27 Ohio St. 426; *State v. Council*, 15 Wis. 30; *Smith v. Appleton*, 19 Wis. 468. See, also, *Butz v. Muscatine*, 8 Wall. 579; *People v. Woods*, 7 Cal. 579; *People v. McLane*, 10 Cal. 563; *State v. Board*, 16 N. J. Law, 504.

⁵ *Cooley's Const. Lim.* (6th ed.), p. 284, with notes on pp. 285-6. The legislature cannot ratify or authorize

§ 1424. **Taxing powers.**—In the absence of constitutional restrictions the legislature may confer the taxing power upon municipal corporations to any extent which it deems expedient, with limitations according to its judgment, as to the objects of taxation, the purposes and the rate. The State often does little beyond prescribing rules of limitation, within which, for local purposes, the local authorities may levy taxes, “but with full reserved power, nevertheless, to limit or recall the delegation at pleasure.”¹ The legislature cannot authorize a municipality to impose a tax which she herself could not levy;² but cities and villages are often empowered to tax trades and occupations which the State abstains from taxing.³ It is essential that local rates shall be locally imposed by those who have to bear the burden; and this power has been constantly delegated to municipalities.⁴

§ 1425. **The same subject continued — Express authority.** Since a municipality has no inherent power to tax, no person

a municipal tax to cover an illegal expenditure. *Carlton v. Newman*, 77 Me. 408; s. c., 9 Am. & Eng. Corp. Cas. 454. See, also, *People v. Mayor*, 51 Ill. 17, where this view of the law is supported in an able opinion. *People v. Common Council*, 28 Mich. 288; *Barnes v. Lacon*, 84 Ill. 461; *Cairo & C. R. Co. v. Sparta*, 77 Ill. 505; *Marshall v. Silliman*, 61 Ill. 218; *People v. Chicago*, 51 Ill. 58; *Lovington v. Wilder*, 53 Ill. 302; *People v. Canty*, 55 Ill. 33; *Wilder v. East St. Louis*, 55 Ill. 133; *Gage v. Graham*, 57 Ill. 144. The legislature may compel a municipality to levy a tax for a local road. *Wilcox v. Deer Lodge Co.*, 2 Mont. 574. The legislature cannot impose taxation to pay what a county does not owe. *Supervisors v. Cowan*, 60 Miss. 876. Nor to bestow a gratuity. *Fuller v. Morrison County*, 36 Minn. 309. The text is further supported in *Mills v. Charleton*, 29 Wis. 400; *People v. Batchellor*, 53 N. Y. 128. *Contra*, *Comm’rs v. State*, 45 Ala. 399. The law in New York

does not seem to be clearly settled. *Thomas v. Leland*, 24 Wend. 65; *People v. Batchellor*, 53 N. Y. 128; *Duanesburgh v. Jenkins*, 57 N. Y. 177; *New York & C. R. Co. v. Van Horn*, 57 N. Y. 473.

¹ See Cooley on Taxation (2d ed.), p. 63, and cases cited. This power must be delegated to the corporation itself, and not to officers. Cooley on Taxation (2d ed.), p. 64.

² *O'Donnell v. Bailey*, 24 Miss. 386; *Nashville v. Thomas*, 5 Cold. (Tenn.) 600; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Memphis v. Hernando Ins. Co.*, 6 Baxt. 527.

³ *Johnson v. Macon*, 62 Ga. 645; *Montgomery v. Knox*, 64 Ala. 463. But this power can be exercised only for the specified purpose. *Webster v. People*, 98 Ill. 343.

⁴ *State v. Denny*, 118 Ind. 382; *Evansville v. State*, 118 Ind. 426; *Caldwell v. Justices*, 4 Jones' Eq. (N. C.) 323; *Burgess v. Pue*, 2 Gill, 11; *Perry v. Rockdale*, 62 Tex. 457; *Holt v. Denny*, 118 Ind. 449.

can be compelled to pay a tax for levying which there cannot be shown a legislative grant of power;¹ and this applies to the exaction of license fees as well as to any other form of taxation. Such power cannot be taken by implication.²

§ 1426. Grant of power strictly construed.—Since the power to tax is a delegated authority, it is always assumed that the State has given all it intended to be exercised, and the grant must be strictly pursued.³

¹ *Ryerson v. Laketon*, 52 Mich. 509; *Jones v. Kolb*, 56 Wis. 263; *Vance v. Little Rock*, 30 Ark. 435; *Comm'rs v. Newell*, 80 Ill. 587; *Stetson v. Kempton*, 13 Mass. 272; *Laramie County v. Albany*, 92 U. S. 307; *Daily v. Swope*, 47 Miss. 367; *Langhorne v. Robinson*, 20 Gratt. 661.

² *Delcambre v. Clere*, 34 La. Ann. 1050; *Burlington v. Baumgardner*, 42 Iowa, 673. After the assessment of a tax by a city under its delegated authority, the legislature may repeal the authority and prohibit collection of the tax. *Augusta v. North*, 57 Me. 392. *Cf. Dubuque v. Illinois & C. R. Co.*, 39 Iowa, 56. Under charter powers to impose taxes, municipalities may prescribe penalties for non-payment, and such penalties become a part of the debt created by the tax, and are collectible in the same manner. *City of Burlington v. Burlington & C. R. Co.*, 41 Iowa, 134. Provisions of the constitution restricting the powers of the State to contract debts for internal improvements do not apply to municipalities. *Pine Grove v. Talcott*, 19 Wall. 675. Provisions abolishing previous exemptions will not, of their own force, give municipal corporations the power to tax. They must show express authority. *Savannah v. Railroad Co.*, 3 Woods, 432.

³ *State v. Brewer*, 64 Ala. 287; *Tallman v. White*, 2 N. Y. 66; *Doughty v. Hope*, 2 Denio, 594; *Cruger v.*

Dougherty, 43 N. Y. 107; *Chicago v. Wright*, 32 Ill. 192; *Scammon v. Chicago*, 40 Ill. 146; *Richmond v. Richmond & C. R. Co.*, 21 Gratt. 604; *Tucker v. Justices*, 34 Ga. 370; *Henderson v. Baltimore*, 8 Md. 352; *Sharp v. Johnson*, 4 Hill, 92; *State v. Davenport*, 12 Iowa, 335; *In re Turfler*, 44 Barb. 46; *Howell v. Buffalo*, 15 N. Y. 512; *Bennett v. Buffalo*, 17 N. Y. 383; *Smith v. Davis*, 30 Cal. 536; *Smith v. Cofran*, 34 Cal. 310; *Montgomery v. State*, 38 Ala. 162; *City of St. Joseph v. Anthony*, 30 Mo. 537; *McComb v. Bell*, 2 Minn. 295; *State v. Jersey City*, 26 N. J. Law, 444; *Municipality No. 1 v. Millaudon*, 12 La. Ann. 769; *Kyle v. Molin*, 8 Ind. 34. Express power to levy particular taxes is a negation to levy others, and the enumeration of particular subjects of taxation precludes the taxation of others. *Baldwin v. City Council*, 53 Ala. 437. Authority to levy a particular tax does not enlarge by implication an existing limitation upon the whole amount of municipal taxation. *Weber v. Traubel*, 95 Ill. 427. A municipal corporation has no power to levy taxes except under express authority or necessary implication. *State v. Maysville*, 12 S. C. 76; *Meriwether v. Garrett*, 102 U. S. 472; *Sharp v. Spier*, 4 Hill, 76; *Manice v. Mayor & C.*, 8 N. Y. 120; *Jeffers v. Lawrence*, 42 Iowa, 505; *Cruger v. Dougherty*, 43 N. Y. 107; *Litchfield v. Vernon*, 41 N. Y. 123; *Mays v. Cincinnati*, 1 Ohio St.

§ 1427. The same subject continued.—The current of authority is strongly against the doctrine of implied powers of municipal taxation, and statutes increasing the burdens of taxation must be strictly construed.¹

§ 1428. Implied powers.—“There is and must be in every town an inherent power to bring the money necessary for the purposes of its creation into the treasury; and if the course is obstructed by the ignorance or mistakes of its agents, they may proceed to enforce the end and object by correcting the means;”² and the taxes they levy of their own authority and the moneys they expend must be for local purposes only.³ The

268; *Jonas v. Cincinnati*, 18 Ohio, 818; *Augusta v. Walton*, 37 Ga. 620; *Sanders v. Butler*, 30 Ga. 679; *Holland v. Baltimore*, 11 Md. 186. See, also, *Cooley on Taxation* (2d ed.), p. 275, and cases cited.

¹ *Chestnutwood v. Hood*, 98 Ill. 132. See, also, *Fisher v. People*, 84 Ill. 491, where, in creating a school district, an implied power to tax was held to have been given, though not mentioned in terms. But see the following cases, where the construction precluded any implication: — *Taft v. Wood*, 14 Pick. 362; *Rawson v. School Dist.*, 100 Mass. 134; *Gustin v. School Dist.*, 10 Gray, 85; *Holmes v. Baker*, 16 Gray, 259. And where municipalities have been vested with authority to borrow money or incur an obligation to execute a public work, they have, unless the contrary appears, without any special grant of power, an implied authority to raise a tax to discharge the obligation. *United States v. New Orleans*, 98 U. S. 381. The power to borrow money and issue bonds implies the power to tax. *Ralls County Court v. United States*, 105 U. S. 733. See, also, to the same purpose, *Peoria &c. R. Co. v. Scott*, 116 Ill. 401. The implication cannot be overcome except by express words excluding it. *United States v. New*

Orleans, 98 U. S. 381; *Loan Ass'n v. Topeka*, 20 Wall. 660; *Commonwealth v. Comm'rs*, 37 Pa. St. 277; *Lowell v. Boston*, 111 Mass. 460; *Hasbrouck v. Milwaukee*, 25 Wis. 122; *Parsons v. City of Charleston*, 1 Hughes, 282. In such case the power is not merely an implied power but a contract duty. *Ralls County v. United States*, 105 U. S. 733, 735; *Wolff v. New Orleans*, 103 U. S. 358. See, also, *United States v. Macon County*, 99 U. S. 582; *Silly v. Taylor*, 88 N. C. 489. The authority to erect water-works carries with it the power to levy taxes for that purpose. *Taylor v. McFadden* (Iowa, 1892), 50 N. W. Rep. 1070.

² *Parker, C. J.*, in *Nelson v. Milford*, 7 Pick. 18, 23. When municipal corporations are created the power of taxation is vested in them as an essential attribute for all the purposes of their existence, unless expressly prohibited. *United States v. New Orleans*, 98 U. S. 381. Such power is necessary to enable them to exercise the authority conferred. *Dubuque v. Chicago &c. R. Co.*, 47 Iowa, 207; *Weeks v. Milwaukee*, 10 Wis. 242; *Zanesville v. Richards*, 5 Ohio St. 589.

³ See *Cooley's Const. Lim.* (6th ed.), p. 263, and cases cited. But the legislature often authorizes taxation for

general power to tax given to a city remains in full force under the original grant until abridged or taken away by a clearly expressed statute.¹

§ 1429. **Charter limitations.**—"It is not unusual in the organic acts of municipalities for the protection of the citizens to *limit the rate of taxation*, or the amount of taxes that may be raised during any one year; and where the power is thus limited, it is not ordinarily enlarged by implication by other provisions of the charter, general in their nature, conferring the power to make contracts or to incur liabilities, or even giving authority to make improvements or to erect usual or ordinary buildings."² But "*special authority* to borrow money for a designated purpose may, and if such be the legislative intention will, impliedly repeal, *pro tanto*, existing charter limitations upon the rate of taxation."³

other than local purposes when the municipality expects benefits therefrom. *Talbot v. Dent*, 9 B. Mon. (Ky.) 526. See, also, *Hasbrouck v. Milwaukee*, 13 Wis. 37.

¹ *Freese v. Woodruff*, 37 N. J. Law, 139; *Maurin v. Smith*, 25 La. Ann. 445; *Orange & C. R. Co. v. Alexandria*, 17 Gratt. 185. When a city of the third class is, by proclamation, under a Kansas statute, declared to be a city of the second class, none of its ordinances regulating the levy of taxes are thereby repealed. *Ritchie v. City of South Topeka*, 33 Kan. 368; s. c., 16 Pac. Rep. 332. The Missouri laws authorizing counties to subscribe to certain railroad stock provide that the county may issue bonds "to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county," and it was held to confer authority to levy a tax sufficient to pay the interest on such bonds, though the general laws restrict the rate "for county purposes" to one-half of one per cent. *Scotland County*

Court v. United States, 140 U. S. 41; s. c., 11 S. Ct. Rep. 697.

² *Dillon on Munic. Corp.* (4th ed.), § 769, citing the following cases:—*Benoist v. St. Louis*, 19 Mo. 179; *Clark v. Davenport*, 14 Iowa, 494; *Learned v. Burlington*, 2 Am. Law Reg. (U. S.) 394, and note; *Leavenworth v. Norton*, 1 Kan. 432; *Barnes v. Atchison*, 2 Kan. 454. But see *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Amey v. Alleghany City*, 24 How. 364; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Butz v. Muscatine*, 8 Wall. 575; *Quincy v. Jackson*, 113 U. S. 332.

³ *Dillon on Munic. Corp.* (4th ed.), § 769. The charter limit for municipal purposes may be exceeded under a special act authorizing the issue of bonds for railroad subscriptions. *Quincy v. Jackson*, 113 U. S. 332; *United States v. Macon County*, 99 U. S. 582. See, also, *Parkersburgh v. Brown*, 106 U. S. 487, 501; *Ralls County Court v. United States*, 105 U. S. 733; *Werner v. Galveston*, 72 Tex. 22; s. c., 20 Am. & Eng. Corp. Cas. 30.

§ 1430. **The same subject continued.**—The general restriction is the rule of law which requires all municipal organizations or boards to show the grant of any authority which they assume to exercise. They cannot vote taxes upon inhabitants indiscriminately, but must be confined to the established powers of such bodies;¹ but most municipalities are also subject to express restrictions, either as to the amount that may be imposed in any one year or as to the objects for which the tax may be levied, and a municipal levy in disregard of the restriction is void.²

§ 1431. **Taxation to aid private enterprises.**—Powers conferred upon municipalities must be construed as confined in their exercise to the municipal limits, whether the power be a general one or specially conferred.³ But there is a question how far the legislature may authorize a municipality to extend its action to objects outside its jurisdiction, in aid of enterprises of a public nature which may be expected to ben-

¹ Cooley on Taxation (2d ed.), p. 348.

² *State v. Humphreys*, 25 Ohio St. 520; *State v. Strader*, 25 Ohio St. 527; *Dean v. Lufkin*, 54 Tex. 265; *Witkowski v. Bradley*, 35 La. Ann. 904. In Nebraska the submission to the people of the question whether a levy should be made in excess of the legal limit is void. *Burlington &c. R. Co. v. Clay County*, 13 Neb. 337. And the levy if made would be void, though the purpose was to pay previous indebtedness. *State v. Comm'rs*, 14 Neb. 22. In Arkansas an excessive levy cannot be sustained, even as to the amount legally allowed. *Worthen v. Badgett*, 32 Ark. 496. But when brought up on *certiorari* it will be quashed only as to the excess. *Vance v. Little Rock*, 30 Ark. 435. Taxes for support of the poor are current county expenses in estimating the amount of lawful levy. *Atchison &c. R. Co. v. Wilhelm*, 33 Kan. 206. Cf. *Kansas City &c. R. v. Albright*, 33 Kan. 211.

³ A general power to "purchase,

hold and convey estate, real and personal, for the public use" of the municipality, was held not to authorize a purchase outside the corporation limits for that purpose. *Riley v. Rochester*, 9 N. Y. 64. But land may be purchased outside to supply the municipality with water. *Newman v. Arche*, 9 Baxt. 380. Or to provide drainage. *Coldwater v. Tucker*, 36 Mich. 474. See, also, *Rochester v. Rush*, 80 N. Y. 302; *Houghton v. Huron Copper Co.*, 57 Mich. 547. Without special provision municipalities possess no control or rights over lands outside their limits. Chancellor Kent in *Denton v. Jackson*, 2 Johns. Ch. 320. But a city may be authorized to take land outside for a park. *In re Mayor*, 99 N. Y. 569. See, also, on the general subject, *Bullock v. Curry*, 2 Met. (Ky.) 171; *Weaver v. Cherry*, 8 Ohio (N. S.), 564; *North Hempstead v. Hempstead*, Hopk. 288; *Concord v. Boscowen*, 17 N. H. 465; *Coldwater v. Tucker*, 36 Mich. 474.

efit the citizens of the municipality, and, the legislative grant of power being given, various questions of construction arise, some of which will be noticed in the next section. In some States the constitutions forbid the legislature to authorize municipalities to aid in works of public improvement, and many State constitutions forbid the State to aid private corporations. Judge Cooley believes that the latter provision is sometimes broad enough to prohibit aid by municipalities also.¹

§ 1432. The same subject continued.—When municipal aid to private enterprises is allowed, the object to be accomplished must be obviously and in a special manner conducive to the prosperity of the municipality.² Whether general or local, taxation must be for a public and not a mere private purpose; and, though sanctioned by State statutes, if it be not for a public use it is an unauthorized taking of private property.³

§ 1433. Discrimination against non-residents.—The legislature may, within the State constitution, authorize municipalities to tax transient traders or itinerant dealers, and such a tax is not in violation of the federal constitution, although the property taxed may be from another State; but there

¹ Cooley's Const. Lim. (6th ed.), p. 268. *Hanson v. Vernon*, 27 Iowa, 47; *Sharpless v. Philadelphia*, 21 Pa. St. 168; *Williams v. Directors*, 33 Vt. 271; *Allen v. Inhabitants*, 60 Me. 124; *Parkersburg v. Brown*, 106 U. S. 487; *Kelley v. Pittsburgh*, 104 U. S. 81; *Loan Ass'n v. Topeka*, 20 Wall. 655; *McMillan v. Anderson*, 95 U. S. 37.

² *Talbot v. Dent*, 9 B. Mon. (Ky.) 526. A town cannot at its own expense raise a fund the income of which is to be devoted to keeping a private cemetery in repair and decorating the graves of certain individuals. *Luques v. Dresden*, 77 Me. 186. Under legislation giving municipalities power to "aid" internal improvements, donations may be given. *State v. Babcock*, 19 Neb. 230.

³ *People v. Township Board*, 20 Mich. 452; *Silsbee v. Stockle*, 44 Mich. 561; s. c., 7 N. W. Rep. 367; *Scammon v. Chicago*, 44 Ill. 269; *Wauwatosa v. Gunyon*, 25 Wis. 271; *Hanson v. Vernon*, 27 Iowa, 47. The aid can only be for a public object, and not for a private manufacturing enterprise. *Parkersburg v. Brown*, 106 U. S. 487; s. c., 2 Am. & Eng. Corp. Cas. 263.

must be no discrimination between resident and non-resident citizens.¹

§ 1434. **State control.**—We have, in a former section,² discussed the question whence municipalities received their authority to tax. This and the following sections have reference to the matter of State control, including local taxation by State compulsion. The State not only confers upon counties, towns, cities and villages the taxing powers which they possess, but it may, in a large measure, control and dispose of the funds collected.³ But the State cannot require its municipalities to tax themselves for purposes foreign to the objects for which they were created;⁴ and there have been very many strong decisions to the effect that, while municipalities may be absolutely controlled as agencies of the State government and in their governmental capacity, they still have powers

¹ *Keller v. State*, 11 Md. 525; *Ward v. Maryland*, 12 Wall. 418, reversing s. c., 31 Md. 279; *Oliver v. Worthington*, 11 Allen, 268; *State v. North*, 27 Mo. 464; *Wiley v. Palmer*, 14 Ala. 267; *Wiggins v. Chicago*, 68 Ill. 372; *Morrill v. State*, 38 Wis. 428; *Ex parte Thomas*, 71 Cal. 204; *Warren v. Geer*, 117 Pa. St. 207; *Barr v. Atlanta*, 64 Ga. 225; *Wynne v. Wright*, 1 Dev. & B. L. (N. C.) 19; *Wilmington Comm'rs v. Roby*, 8 Ired. L. (N. C.) 250; *State v. Charleston*, 10 Rich. L. (S. C.) 240. An ordinance, void for discriminations against citizens of other States, is not valid by the fact of like discriminations against citizens of the State outside the city. *Fecheimer v. Louisville*, 84 Ky. 306. See, also, *Marshalltown v. Blum*, 58 Iowa, 184. Foreign corporations may be taxed, under legislative authority, though domestic corporations are exempt from the same tax. 1 *Desty on Taxation*, p. 343. A municipal tax on vessels, estimated by "length over all," is void as a tonnage duty. *Board of Comm'rs v. Pashley*, 19 S. C. 315; s. c., 3 Am. &

Eng. Corp. Cas. 495. But it is admitted that vessels may be taxed like other property. *Peete v. Morgan*, 19 Wall. 581; *Transportation Co. v. Wheeling*, 94 U. S. 273; *Cannon v. New Orleans*, 20 Wall. 577; *Inman Co. v. Tinker*, 94 U. S. 238; *Lott v. Morgan*, 41 Ala. 246. Wharfage charges are not forbidden by the federal constitution. *Marshall v. Vicksburg*, 15 Wall. 146; *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, 100 U. S. 430.

² See § 1424, *supra*.

³ *Trustees v. Tatman*, 13 Ill. 27; *Richland Co. v. Lawrence Co.* 11 Ill. 1; *Harrison v. Bridgton*, 16 Mass. 16; *San Francisco v. Canavan*, 42 Cal. 541; *Payne v. Treadwell*, 16 Cal. 221; *North Yarmouth v. Skillings*, 45 Me. 133; *Palmer v. Fitz*, 51 Ala. 489; *State v. St. Louis*, 34 Mo. 546; *Rawson v. Spencer*, 113 Mass. 40; *Weymouth v. Comm'rs*, 108 Mass. 142.

⁴ *People v. Trustees*, 78 Ill. 136; *People v. Dupuyt*, 71 Ill. 651; *Weightman v. Clark*, 113 U. S. 256; *Trustees v. Railway Co.*, 63 Ill. 299.

and rights for the benefit and convenience of their own citizens similar to those enjoyed by private corporations. Some of the decisions of the several States will be noticed in the following section.

§ 1435. **The same subject continued.**—The decisions on this question have been somewhat at variance, but when the legislatures have gone further than to *permit* taxation for purposes not strictly local, the courts have generally held that the legislative power has been exceeded.¹

§ 1436. **Execution of charter powers.**—The taxing power cannot be delegated to any officer or committee, but must be exercised by the legislative department itself. This is a fundamental principle, and nothing but the most positive and explicit language could justify a decision that the legislature of the State intended to permit such a power to be conferred.²

¹ In *Atkins v. Randolph*, 31 Vt. 226, 236, Justice Barrett says that "courts that have gone farthest in sustaining laws of State legislatures against the restrictive provisions of State constitutions repudiate entirely the idea that a person, whether natural or artificial, can be compelled by legislative enactment to become a party to, or to be subjected to liability upon, a contract." See, also, opinion of Chief Justice Black in *Sharpless v. Philadelphia*, 21 Pa. St. 147, 165. In Wisconsin, Maine, Massachusetts and Michigan a strong stand has been taken to the same purpose. *Hasbrouck v. Milwaukee*, 13 Wis. 37; *Mills v. Charlton*, 29 Wis. 400; *Knapp v. Grant*, 27 Wis. 47; *State v. Haben*, 22 Wis. 660 (but see, *contra*, *Jensen v. Supervisors*, 47 Wis. 298); *Brunswick v. Litchfield*, 2 Greenl. (Me.) 28, 32; *Bowdoinham v. Richmond*, 6 Greenl. (Me.) 112; *Hampshire v. Franklin*, 16 Mass. 76, 84. See, also, *Richland v. Lawrence*, 12 Ill. 1, 8; *People v. Council*, 28 Mich. 228. In Kansas it was held that the legislature could not validate bonds bearing a higher

rate of interest than was permitted by the law under which the bonds were issued, as this would be making a new contract to which the county had not assented. *Shawnee County v. Carter*, 2 Kan. 115. See, also, *People v. Chicago*, 51 Ill. 17; *Livingston v. Wilder*, 53 Ill. 302; *Wilder v. East St. Louis*, 55 Ill. 133; *Sleight v. People*, 74 Ill. 47; *Cornell v. People*, 107 Ill. 372; *Pope v. Phifer*, 3 Heisk. 682. New York and Alabama decisions are opposed. *President &c. v. State*, 45 Ala. 399; *People v. Flagg*, 46 N. Y. 401; *Gordon v. Cornes*, 47 N. Y. 608; *Thomas v. Leland*, 24 Wend. 65, 67; *Doanesburgh v. Jenkins*, 57 N. Y. 177, 187. But in *People v. Batchelor*, 53 N. Y. 128, it was held that a town could not be compelled to aid a railroad corporation. See, in this connection, opinions of justices in the following cases: — *In re Washington Avenue*, 69 Pa. St. 353; *Howell v. Bristol*, 8 Bush, 493.

² *Thompson v. Schermerhorn*, 6 N. Y. 92; *Smith v. Morse*, 2 Cal. 524; *Oakland v. Carpentier*, 13 Cal. 540; *Whyte v. Nashville*, 2 Swan (Tenn.),

But this principle does not prevent a corporation from empowering its agents to make contracts.¹

§ 1437. Voting the tax.—Municipalities exercise the power conferred upon them by vote of the corporators at public meetings, or by agents or officers duly elected or chosen. Many taxes are required to be voted at meetings composed of all the voters of the municipality to be taxed, or of certain classes of the voters specially interested. But in large districts, such as counties and large cities, the taxes are voted by representatives of the people.² And, in general, it may be said that the question of local levies is left to the local boards, clothed with a *quasi*-legislative authority. Such boards must act by majorities at regular meetings or their action is void.³

364; *East St. Louis v. Wehrund*, 50 Ill. 28; *Kinmundy v. Mahan*, 72 Ill. 462; *State v. Fisk*, 9 R. I. 94; *State v. Patterson*, 34 N. J. Law, 168; *Lyon v. Jerome*, 26 Wend. 485; *Ruggles v. Collier*, 43 Mo. 353; *State v. Jersey City*, 25 N. J. Law, 309; *Davis v. Reed*, 65 N. Y. 566; *Supervisors v. Brush*, 77 Ill. 59; *Thompson v. Boonville*, 61 Mo. 282; *In re Quong Woo*, 13 Fed. Rep. 229; *Benjamin v. Webster*, 100 Ind. 15; *Minneapolis Gas-light Co. v. Minneapolis*, 36 Minn. 159. *Cf. In re Guerréro*, 69 Cal. 88. It has been held that the power to "alien, lease, farm and dispose of all and every kind of property," and "to lay and collect taxes in such manner as may be deemed expedient on all steamboats, etc., landing at the levee of the corporation," gave the power to lease to a private person the revenues of the port with the privilege of collecting them in his own name and for his own benefit. *Schwartz v. Flatboats*, 14 La. Ann. 243. See, also, *Dillon on Munic. Corp.* (4th ed.), § 779, where numerous other cases are cited.

¹ *Railroad v. Marion*, 36 Mo. 294; *Schenley v. Commonwealth*, 36 Pa. St. 62.

² Sometimes the question is required

to be submitted to tax-payers only. *Bullock v. Curry*, 2 Met. (Ky.) 171; *Gould v. Stirling*, 23 N. Y. 439; *Duanesburgh v. Jenkins*, 57 N. Y. 177; *Bennington v. Park*, 50 Vt. 178; *Venice v. Murdoch*, 92 U.S. 494. But in Louisiana and Minnesota such a provision would be unconstitutional. *Harrington v. Plainview*, 27 Minn. 224; *Bayard v. Kling*, 16 Minn. 249; *Duperier v. Viator*, 35 La. Ann. 957.

³ *Downing v. Rugar*, 21 Wend. 178, 182; *Powell v. Tuttle*, 3 N. Y. 396; *People v. Chenango*, 11 N. Y. 563; *Columbus &c. R. Co. v. Grant County*, 65 Ind. 427; *Bank of Chenango v. Brown*, 26 N. Y. 467; *Fire District v. Comm'rs*, 108 Mass. 142; *Petition of Merriam*, 84 N. Y. 596. See *Cooley on Taxation* (2d ed.), pp. 258-9, where numerous other cases are cited. If only two of a board of three are chosen or qualify and act, the action is void. *Schenck v. Peay*, 1 Dill. 267; *Williamsburg v. Lord*, 51 Me. 599. *Cf. Howard v. Proctor*, 7 Gray, 128. The presumption is in favor of legal action until the contrary is proven. *Snell v. Hope*, 3 Denio, 594, 593; *Ex parte Baltimore Turnpike Co.*, 5 Binn. 481. When a law provides that the commissioners

§ 1438. The same subject continued.—In the voting and levying of taxes strict constructions of the law are not the rule;¹ and when the intent to levy a tax is clear it amounts to a present levy, provided the intent is warranted by law.²

§ 1439. Assessment and collection further considered.—The right of a municipal corporation to sue for and collect taxes depends upon its authority under the statutes, or grant of power by the State, to levy and impose the same.³

shall "jointly view and assess," this requires the presence of all in both cases. *People v. Coghill*, 47 Cal. 361. Cf. *Palmer v. Doney*, 2 Johns. Cas. 346. The action of the proper authorities in voting a tax cannot be restrained on the ground of an excessive levy. *Wharton v. Directors*, 42 Pa. St. 358. See, also, *Moore v. Directors*, 59 Pa. St. 232. Nor can the people of a township, or the proper board, be compelled by *mandamus* to vote needful taxes. See, also, *Union County Court v. Robinson*, 27 Ark. 116; *Truesdell's Appeal*, 58 Pa. St. 148.

¹ *Irwin v. Lowe*, 89 Ind. 490; *Taymouth v. Koehler*, 35 Mich. 22; *School District v. Garvey*, 80 Ky. 159.

² *Davis v. Bruce*, 82 Ill. 542; *Wright v. People*, 87 Ill. 582; *State v. Sickles*, 24 N. J. Law, 125; *Adams v. Hyde*, 27 Vt. 221; *Shontz v. Evans*, 40 Iowa, 139; *Blodgett v. Holbrook*, 39 Vt. 336; *West Hampton v. Searle*, 127 Mass. 502. In the absence of charter provisions the commissioners of a township may adopt the assessment made for State and county purposes as the basis of the levy made by them for township taxes. *Koontz v. Burgess &c. of Hancock*, 64 Md. 134; s. c., 20 Atl. Rep. 1039. A law authorizing the extension of a levy is a standing levy. *Davis v. Bruce*, 82 Ill. 542. Every essential proceeding in the course of a levy must be in a written form. *Moser v. White*, 29

Mich. 49; *Appeal of Powers*, 29 Mich. 504; *Doe v. McQuilkin*, 8 Blackf. 335; *Hecht v. Boughton*, 2 Wy. 368. See, also, opinion of Justice Richardson in *Cardigan v. Page*, 6 N. H. 182, 191. In Pennsylvania there is an exception in case of a school tax. *Gearheart v. Dixon*, 1 Pa. St. 224, 228. Any modification of the vote of the people by the officers who execute the levy is *ultra vires* and void. *Platteville v. Galeña &c. R. Co.*, 43 Wis. 493; *Hodgman v. Railroad Co.*, 20 Minn. 48; *Sullivan v. Walton*, 20 Fla. 552; *State v. Daviess*, 64 Mo. 30. *Mandamus* will not lie against a county court to compel the levy of a tax, but must be brought against the individual officers intrusted with the performance of that duty. *Montgomery County v. Menifee County Court* (Ky.), 18 S. W. Rep. 1021. Under a charter power to "regulate, clean and keep in repair" streets out of a fund raised by taxes each year, a city cannot, by resolution, expend money for graveling or macadamizing streets. *State v. Passaic*, 46 N. J. Law, 124. A tax to be levied for the payment of a judgment, in addition to the regular taxes, must be assessed and collected at the same time and in the same manner as the general assessment, and not by a special assessment. *State v. Assessors* (N. J.), 17 Atl. Rep. 122.

³ *Brown v. City of Cape Girardeau*,

§ 1440. Purposes for which the tax may be levied.—Municipal taxation must be for local purposes only,¹ and for a

90 Mo. 377; s. c., 2 S. W. Rep. 302. The city treasurer alone can enforce the payment of city taxes. A contract of the city with another person to collect them is void. *Fort Wayne v. Lehr*, 88 Ind. 62; s. c., 3 Am. & Eng. Corp. Cas. 600. Neither the statute of limitations nor the laches of officers will prevent the collection of municipal taxes. But these facts, with other circumstances, may afford presumption that the tax has been paid. *Elliott v. Williamson*, 10 Lea (Tenn.), 38; s. c., 3 Am. & Eng. Corp. Cas. 603. In a suit to collect a tax an averment that the same was duly levied is sufficient without setting out the ordinance levying it. *Johnson v. City of Kansas*, 78 Mo. 661; s. c., 6 Am. & Eng. Corp. Cas. 197, holding, also, (1) that a provision of the Missouri constitution that all taxes shall be levied by general laws does not repeal the special provisions in municipal charters authorizing taxes, and (2) that, in suits for taxes, the fact that the judgment, including interest and costs, amounts to more than is sued for, does not defeat the action. Under acts of Florida of 1885, chapter 3606, section 9, as amended by chapter 3607, which makes it the duty of the tax collector of the county in which a defunct city is situated to collect such taxes as may be assessed by the county tax assessor, the county tax collector cannot collect back taxes levied by the city assessor of the defunct city. *City of Pensacola v. Sullivan*, 23 Fla. 1. Under Revised Laws of Vermont, section 2692, providing that "selectmen shall have

the general supervision of the concerns of the town," they may instruct a tax collector not to enforce the collection of an illegal tax; and where the collector has paid to the town treasurer in advance of collection the full amount of such tax, and has followed the instructions given him as to enforcement, the selectmen may bind the town by their promise to repay such part of the tax as he cannot collect by voluntary payments. *Miles v. Albany*, 59 Vt. 79. A town collector of taxes who, by contract with the town, guarantees the collection of the taxes, and pays them to the town at the dates fixed, whether collected or not, is entitled to the interest on delinquent taxes. *Town of Needham v. Morton*, 146 Mass. 476. The city of Buffalo being authorized by its charter to take, purchase and hold and convey real and personal property as its purposes may require has full power to accept a mortgage on real estate as security for taxes which had accrued thereon. *Clark v. Locke*, 9 N. Y. Supl. 918. Under Probate Laws of New Jersey, 1881, page 256, the town committee may release a tax collector from his liability for not collecting an uncollectible tax, but not from his duty to collect taxes that may be collected by due process of law; and where he is released by such committee from the collection of a tax which the tax-payers refused to pay on account of its alleged illegality, but which is in fact legal, he is still liable if he fail to collect. *Painter v. Township of Blairstown* (N. J.), 12 Atl. Rep. 187.

¹ *Parsons v. Goshen*, 11 Pick. 396; *Supervisors v. United States*, 19 Wall, Concord v. Boscawen, 17 N. H. 465; 71. See Cooley on Taxation (2d ed.), Jeffries v. Lawrence, 42 Iowa, 498; p. 140.

public use,¹ and the rule of strict construction should always be applied.²

California act of February 27, 1850, abolishing "the mayor and common council of the city of Sacramento," and vesting its property and rights in a corporation named the "city and county of Sacramento," provided for the issuing of city of Sacramento bonds for funding and paying the city debts, and that a tax be levied on property within the city limits to pay the bonds. Subsequently the legislature created the "city of Sacramento," and made it the legal successor of the city and county of Sacramento. It was held that the new corporation was bound to levy and collect the tax. *Meyer v. Brown*, 65 Cal. 583. A tax collector has no authority, outside of the town in which he has his appointment, to seize the property of a resident of the town to enforce a collection of a tax. *Gage v. Dudley*, 64 N. H. 437. Where moneys have been raised by a municipality by means of a special tax to create a fund for a special purpose, *e. g.*, to pay off certain bonds, and that purpose has afterwards been judicially held to be unlawful by the bonds being declared void, the municipality cannot thereupon devote the fund to other purposes; and such appropriation will be enjoined at the suit of any tax-payer. *Town of Aurora v. Chicago & C. R. Co.*, 119 Ill. 246. The levy and collection of a tax by a city in discharge of a contract made by it does not create any privity of interest between the contractor and the tax-payer. *Becker v. Keokuk Waterworks* (1890), 79 Iowa, 419; s. c., 18 Am. St. Rep. 377.

¹*Curtiss v. Whipple*, 24 Wis. 350; *Tyron v. School Directors*, 51 Pa. St. 9; *People v. Batchellor*, 53 N. Y. 128;

Lowell v. Boston, 111 Mass. 454; *Hanson v. Vernon*, 27 Iowa, 28, 47; *Doyle v. Austin*, 47 Cal. 360; Opinion of Judges, 58 Me. 591; *Loan Ass'n v. Topeka*, 20 Wall. 655. Very interesting cases on this subject are *Weisner v. Douglas*, 64 N. Y. 91; *Brewer Co. v. Brewer*, 62 Me. 62; *Wilkinson v. Cheatham*, 43 Ga. 258; *Feldman v. Charleston*, 23 S. C. 57, where an act authorizing a city to issue bonds to aid individuals in replacing buildings destroyed by fire was held unconstitutional. Same point, *Boston fire*, *Lowell v. Boston*, 111 Mass. 463.

²*Cooley's Const. Lim.* (6th ed.), ch. 14. See, also, *Stetson v. Kempton*, 13 Mass. 272; *Alley v. Edgecomb*, 53 Me. 446; *Vanover v. Justices*, 27 Ga. 354; *Alton v. Aetna Ins. Co.*, 82 Ill. 45. In Maine a general power to tax for town purposes was held not to include the right to tax in order to make a toll-bridge free. *Bossey v. Gillmore*, 3 Me. 191. But see *Holcombe v. Comm'rs*, 89 N. C. 346. If a municipal body is charged with the care of streets and sidewalks, the word "streets" as used in a section of the charter authorizing it to raise money by taxation for the support of "bridges, culverts, streets, lanes and alleys," includes sidewalks. *Pomfroy v. Village of Saratoga Springs*, 104 N. Y. 459. "Necessary town charges" cannot be construed to give a power to aid railroads or similar enterprises not strictly local in advantages. *Campbell v. Taylor*, 8 Bush, 206; *State v. Macon County Court*, 68 Mo. 29; *Winston v. Railroad Co.*, 1 Baxter, 61; *Frederick v. Augusta*, 5 Ga. 561. Taxation for water supplies is not disputed. *Mayor v. Bailey*, 2 Denio, 433; *West v. Bancroft*, 32 Vt. 367; *Wells v. Atlanta*, 43 Ga. 67;

§ 1441. **Local taxes for schools.**—The State has the same power to apportion the moneys raised for the general purpose that it has to apportion moneys raised for police purposes or for roads.¹ A city issued bonds for building a high school without authority of law. The legislature afterward legalized the issue, and the act was held not in violation of the constitution, which prohibited special legislation in the interest of corporations.²

Dillon's Munic. Corp., §§ 146, 443. A town may vote aid to fire companies. *Van Sicklen v. Burlington*, 27 Vt. 70. Municipalities may contract with private parties for the supply of corporate needs. *Western & Co. Society v. Philadelphia*, 31 Pa. St. 175, 185; *Nelson v. La Porte*, 33 Ind. 258. The supplying of cities and towns and their citizens with natural gas for public and private consumption is a public use or purpose, and hence the taxing power may be exercised to provide for the payment of the principal and interest of bonds issued to carry out the purpose of such supply. *State v. City of Toledo*, 48 Ohio St. 112; s. c., 26 N. E. Rep. 1061. For other decisions on the subject of this section, see Cooley on Taxation (2d ed.), p. 135.

¹ Cooley on Taxation (2d ed.), p. 683. See, also, *State Board v. Aberdeen*, 56 Miss. 518; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Logan County v. Lincoln*, 81 Ill. 156; *Merriwether v. Garrett*, 102 U. S. 472; *Bramwell v. Goheen* (Idaho), 29 Pac. Rep. 110, where the statute powers could not be exceeded.

² *Read v. Plattsburgh*, 107 U. S. 568; s. c., 2 Am. & Eng. Corp. Cas. 300. A majority of the assembled inhabitants of the district, not a city council, may authorize a tax to build a school-house. *Lee v. Trustees*, 36 N. J. Eq. 581; s. c., 3 Am. & Eng. Corp. Cas. 560, holding, also, that money raised by taxation for school

purposes generally could not be used to build school-houses. A lessee of school lands is taxable on the same. *Bentley v. Barton*, 41 Ohio St. 410; 9 Am. & Eng. Corp. Cas. 440. In the absence of special exemption private interest in school lands conferred on the State by the United States is taxable after sale or lease of the same by the State. *Bentley v. Barton*, *supra*. A tax on only part of a district is void. *Auditor v. MacArthur* (Mich.), 49 N. W. Rep. 592. On proceedings by a tax-payer to restrain the collection of a tax voted by a school district, the question of the legality of the formation of the district cannot be raised. *Atchison & Co. R. Co. v. Wilson*, 33 Kan. 223. In the case of a tax for building a school-house to be leased to an academy corporation for school purposes, the test of a public use is not a right of enjoying the property wholly at the public expense, but a common and equal right free from unreasonable discrimination. *Holt v. Antrim*, 64 N. H. 284, holding, also, that a special legislative act authorizing a town to raise money by taxation "for the purpose of erecting a school building," and to give a perpetual lease of it to an academy corporation "for school purposes without payment of rent" (*Laws N. H. 1883*, ch. 202, § 5), is not an unconstitutional sanction to taxation for a private purpose. A private person cannot, merely as a citizen and tax-payer,

§ 1442. **Lien of taxes.**—Liens of municipal taxes are of the same rank as those of State taxes.¹ But no tax is a lien upon the property against which it is levied, unless made so by charter, or unless the municipality is authorized to declare them liens.²

§ 1443. **Exemptions.**—Statutes exempting persons or property from taxation must be construed with strictness and most strongly against the person claiming the exemption.³ A

maintain an action to restrain school district officers from erecting a school-house on a particular site. *Nixon v. School District*, 32 Kan. 510. Under Public Statutes of Rhode Island, chapter 51, section 4, empowering a school district to raise money by taxation, "provided the amount of the tax be approved by the school committee of the town," the committee's approval need not precede the voting of the tax. *Seabury v. Howland*, 15 R. I. 446. See, also, the following cases:—*School Dist. v. Webber*, 75 Mo. 558; *Seaman v. Baughman* (Iowa), 47 N. W. Rep. 1091; *School Dist. v. School Dist.* (Kan.), 26 Pac. Rep. 43; *Trustees v. Broadhurst* (N. C.), 13 S. E. Rep. 781; *Capital Bank v. School Dist.* (N. D.), 48 N. W. Rep. 363; *State v. Tracy*, 94 Mo. 217; *King v. Utah &c. R. Co.* (Utah), 22 Pac. Rep. 158; *Johns v. State* (Ind.), 30 N. E. Rep. 640; *People v. Hege-man*, 4 N. Y. Supl. 351.

¹ *Justice v. Logansport*, 101 Ind. 326; s. c., 9 Am. & Eng. Corp. Cas. 456.

² *Alleghany City's Appeal*, 41 Pa. St. 60; *Howell v. Philadelphia*, 38 Pa. St. 471; *Philadelphia v. Greble*, 38 Pa. St. 339; *Heine v. Comm'rs*, 19 Wall. 655; *Meriwether v. Garrett*, 102 U. S. 472; *Jefferson v. Whipple*, 71 Mo. 519; *Kansas City v. Payne*, 71 Mo. 159. Authority to provide for the prompt collection of taxes, and, to that end, to sell *real* as well as per-

sonal property, gives a city power to declare taxes a lien on realty. *Eschbach v. Pitts*, 6 Md. 71. Where the charter of a city declares that the taxes levied by the city council shall be a lien on property against which they are assessed, but does not fix the time when the lien shall attach, such taxes become a lien from the time when the assessment roll and the warrants for collection come into the hands of the receiver of taxes. *Eaton v. Chesebrough*, 82 Mich. 214. Under Revised Statutes of Illinois, 1889, chapter 120, section 253, which provides that the lien of taxes on land may be foreclosed by suit in equity in the name of the people when the land has been forfeited to the State at tax sale for two years, the lien of special assessments for drainage purposes may be foreclosed by such suit. *Rickert v. Drainage Dist.* (Ill.) 27 N. E. Rep. 86. See, further, as to liens, *Mix v. Ross*, 57 Ill. 121; *Herschberger v. Pittsburgh*, 115 Pa. St. 78; *Provident Institute v. Jersey City*, 113 U. S. 506. That a tax is not a debt and cannot be set off against a debt, see *Cooley on Taxation* (2d ed.), pp. 16, 17. A claim of a municipal corporation against a citizen thereof for work done by the corporation for which the citizen is liable is not a tax. *Plaquemines Police Jury v. Mitchell*, 37 La. Ann. 44.

³ *Dillon on Munic. Corp.* (4th ed.), § 776; *Earl, J.*, in *People v. Comm'rs*,

municipal corporation has no power to grant exemption from or commutation of taxes, and a contract which undertakes to do so is void; nor can municipalities discriminate in favor of any property. The power to exempt is not included in the power to tax, but must be specifically conferred.¹

§ 1444. The same subject continued — Corporations.—

The provisions of an act exempting the capital stock and personal property of specified corporations and companies applies only to State taxation, and does not affect the right of municipalities to tax such property for local purposes.² Property

95 N. Y. 554. *Cf.* *State v. St. Paul*, 36 Minn. 529; *New Orleans v. Carondelet &c. Co.*, 36 La. Ann. 396.

¹ *State v. Hannibal &c. R. Co.*, 75 Mo. 208, a leading case; *Mack v. Jones*, 21 N. H. 393; *Brewer Co. v. Brewer*, 62 Me. 62; *State v. Gracey*, 11 Nev. 223; *Hazzlett v. Mt. Vernon*, 33 Iowa, 229; *State v. Anderson*, 2 S. C. 499; *Weeks v. Milwaukee*, 10 Wis. 242. A municipality may grant exemptions when authorized by the State. *Athens v. Long*, 54 Ga. 330; *Waring v. Savannah*, 60 Ga. 96. A contract to exempt from taxation without such authority is void. *State v. Hannibal &c. R. Co.*, 75 Mo. 208. Exemptions from "public taxes" are not exemptions from municipal taxes. *Morgan v. Cree*, 46 Vt. 773. But see *New Orleans v. Carondelet &c. Co.*, 36 La. Ann. 396, where an unqualified exemption from taxation was held to imply immunity from municipal as well as State taxes. An exemption of a private corporation from municipal taxes is not affected by the dissolution of the municipal corporation and its replacement by another. *Mobile &c. R. Co. v. Kennerly*, 74 Ala. 566. That exemptions from "taxation" do not exempt from local "assessments," see ch. XXVIII, *supra*. An exemption must be of a class and not of an individual of the

class. *New Orleans v. New Orleans &c. Co.*, 32 La. Ann. 105; *Cooper v. Ash*, 76 Ill. 11. A provision exempting a corporation from all taxation applies not only to the State but to every public corporation created by it. *State Bank v. Charleston*, 3 Rich. Law, 342; *Mayor v. Baltimore &c. R. Co.*, 6 Gill, 288; *Richmond v. Richmond &c. R. Co.*, 21 Gratt. 604.

² *Orange &c. R. Co. v. Alexandria*, 17 Gratt. 176; *Protestant Home v. Mayor*, 35 N. J. Law, 157; *People v. Davenport*, 91 N. J. 574; *In re New York*, 11 Johns. 77; *Buffalo Cemetery v. Buffalo*, 46 N. Y. 506. *Cf.* *Richmond v. Richmond &c. R. Co.*, 21 Gratt. 604. A provision in the charter of a bank which provides that the payment of a specified sum on each hundred dollars of capital stock shall be "in full of all tax or bonus" exempts the bank from assessment for county or city taxation. *Franklin Co. Court v. Bank*, 87 Ky. 370; s. c., 25 Am. & Eng. Corp. Cas. 333. A municipal corporation, authorized by its charter to tax "all" the real and personal property therein, has no power to exempt any of such property from taxation. *Whiting v. Town of West Point (Va.)*, 14 S. E. Rep. 698. Under a Rhode Island statute permitting any town council to grant the right to lay water-pipes in

owned by a municipality for public use cannot be taxed unless so provided by positive legislation.¹

§ 1445. Exemptions further considered — Whiting v. West Point.—In a recent case in Virginia² the Supreme Court of Appeals formulated the point in issue as follows:—“The real question . . . is whether a municipal corporation has the inherent power to exempt from taxation any property which by its charter it is authorized to tax.” The town of West Point was authorized by its charter to tax “all the real and personal property” in the town, and it was made the duty of the town council annually to appoint an assessor whose duty was to assess “all personal property and all improvements put upon real estate in the town since the last preceding assessment.” The case arose upon a petition for a writ of *mandamus* to compel the assessor to assess for taxation the property of the West Point Terminal Railway & Warehouse Company, which had been exempted from taxation by ordinance, the exemption to continue so long as the company

a highway, and to erect and maintain reservoirs, including the power to exempt such pipes and reservoirs from taxation, the exemption can only be made as one of the terms of the grant, and cannot be given to works already built. *Bowen v. Newell*, 16 R. I. 238; s. c., 14 Atl. Rep. 873. See, also, *Lancaster v. Clayton*, 86 Ky. 373; s. c., 5 S. W. Rep. 864; *Nashville &c. R. Co. v. Wilson* (Tenn.), 15 S. W. Rep. 446.

¹ *Stein v. Mobile*, 24 Ala. 591; *Wayland v. Comm'rs*, 4 Gray, 500; *Louisville v. Commonwealth*, 1 Duvall, 295; *Water Comm'rs v. Gaffney*, 34 N. J. Law, 133; *Piper v. Singer*, 4 Serg. & R. 354; *People v. Doe*, 36 Cal. 220; *Law v. Lewis*, 46 Cal. 549; *People v. Solomon*, 51 Ill. 37; *Fort Dodge v. More*, 37 Iowa, 388; *Erie County v. Erie*, 113 Pa. St. 360; *Nashville v. Smith*, 86 Tenn. 213; *Rochester v. Rush*, 80 N. Y. 302; *Green v. Hotaling*, 44 N. J. Law, 347. See, also, *People v. Brooklyn Assessors*, 111 N. Y. 505; *Galveston Wharf Co. v. Gal-*

veston, 63 Tex. 14. In the latter case it was held that city property in a wharf was exempt from taxation; that the charge of a reasonable fee for the use of such wharf did not change its public character; that municipal interest was exempt, though individual interests in the same wharf were taxed; and that, in the absence of statute or constitutional provision, municipal property was exempt. But property owned by the municipality merely for the convenience or profit of its citizens would be taxed under a general statute embracing like property owned by a private corporation. *Bailey v. New York*, 3 Hill, 531; *Storrs v. Utica*, 17 N. Y. 104; *Western &c. Society v. Philadelphia*, 31 Pa. St. 175; *Comm'rs v. Dockett*, 20 Md. 468; *Detroit v. Corey*, 9 Mich. 165.

² *Whiting v. West Point* (Va., 1892), 14 S. E. Rep. 698; s. c., 15 L. R. An. 860, and valuable note.

should keep its principal office in Virginia within the corporate limits of the defendant town. Nothing was said in the charter about making exemptions. Lewis, J., declared it to be a clear doctrine, both upon principle and authority, that the corporation had no power to make the exemption. "A municipal corporation has no element of sovereignty. It is a mere local agency of the State, having no other powers than such as are clearly and unmistakably granted by the law-making power. . . . The power of taxation is not only an attribute of sovereignty, but it is essential to the existence of government; and as all are protected by the government, so all should contribute to its support. . . . So, also, is the power to make exemptions sovereign in its nature and likewise resides in the legislature unless the constitution otherwise ordains. It is therefore a legal solecism to say that the power of exemption or any other sovereign power is inherent in a municipal corporation, which, though invested with certain governmental powers for local purposes, is in no particular sovereign." The court referred to some of the leading cases in point,¹ and proceeded:—"These authorities, which are only a few of many that might be cited to the same effect, show that the rule requiring all municipal powers to be construed strictly applies especially to a case like the present; and the reason, as already suggested, is this: that the power of taxation, being an attribute of sovereignty, can be exercised only by the sovereign. Hence, when delegated by the legislature to a municipal corporation, the latter is considered as *pro hac vice* the agent of the State, acting for the benefit

¹State v. Hannibal &c. R. Co., 75 Mo. 209, in which "the court rested its decision upon the ground that the power to make exemptions was not conferred by the city's charter, and that the delegated power to tax was in the nature of a public trust, which could not be surrendered in whole or in part. No argument, it was said, was necessary to show that the same principle which forbids the absolute cession by a municipality of this power likewise forbids that which approximates thereto, namely,

the right to make exemptions. It was said, moreover, that the idea of taxation imports equality of apportionment; that it is this which distinguishes taxation from arbitrary exaction; and that the exemption of the property of one person casts an inequitable burden upon others not thus graciously favored." The same principle was enforced in *Austin v. Austin Gas-light &c. Co.*, 69 Tex. 180, and *Wilson v. Sutter County Supervisors*, 47 Cal. 91.

of the municipality. In other words, the municipality, in the eye of the law, is the hand of the State by which the tax is laid and collected. Therefore the statutory authority must be strictly pursued; for as an agency to sell does not imply an agency to buy, so neither does a delegated power to tax imply a power to exempt. If this were not so, and if a municipal corporation could at pleasure exempt the property of one person, it could exempt the property of all, and thus deprive itself of the means of existence or of accomplishing the objects for which it was created."¹

§ 1446. Remedies.—A general discussion of the remedies of tax-payers will be found in another chapter.² The only remedy for over-taxation is that given by statute, and abatement is the usual remedy. In the absence of fraud the courts can afford no relief.³ When there is no statutory provision a tax-payer can maintain an action against a municipality only when the circumstances are such as to render repayment equitable.⁴

¹Whiting v. West Point (Va., 1892), 14 S. E. Rep. 698; s. c., 15 L. R. An. 860. The court cited in support of its views, Gilman v. Sheboygan, 2 Black, 510; Langhorne v. Robinson, 20 Gratt. 661; Richmond v. Richmond &c. R. Co., 21 Gratt. 604, pronouncing Williamson v. Massey, 33 Gratt. 237, cited by defendant, not in point, and refusing to be bound by Danville v. Shelton, 76 Va. 325, on the ground that the case was heard by only a part of the court and that it was also probably decided on another point.

²See chapter XXXVIII, *infra*.

³Republic &c. Co. v. Pollack, 75 Ill. 292; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; Hicks v. Westport, 130 Mass. 480; Preston v. Boston, 12 Pick. 7; Sherwin v. Wigglesworth, 129 Mass. 64; Vose v. Willard, 47 Barb. 320. Non-abatement is no evidence of payment. Milford v. Greenbush, 77 Me. 330; s. c., 9 Am. & Eng.

Corp. Cas. 71. City taxes assessed and collected by mistake upon farm land, paid under fear that property will be sold, may be recovered back. Louisville v. Anderson, 79 Ky. 334; s. c., 3 Am. & Eng. Corp. Cas. 585. Voluntarily paid taxes cannot be recovered. Snell v. Campbell, 24 Fed. Rep. 880; s. c., 9 Am. & Eng. Corp. Cas. 472.

⁴Woolley v. Staley, 39 Ohio St. 354; Indianapolis v. McAvoy, 86 Ind. 587; Tupelo v. Beard, 56 Miss. 532; Weber v. San Francisco, 1 Cal. 455; Kellogg v. Ely, 15 Ohio St. 64; Tash v. Adams, 10 Cush. 252; Warren v. Grand Haven, 30 Mich. 24; Peoria v. Kidder, 26 Ill. 351; Pease v. Whitney, 8 Mass. 93; La Fayette v. Fowler, 34 Ind. 140; Patterson v. Baumer, 43 Iowa, 477; Harwood v. Huntoon, 51 Mich. 639; Carroll County v. Graham, 98 Ind. 279; Ware v. Percival, 61 Me. 391; Eifert v. Town of Central Covington (Ky.), 15 S. W. Rep. 180.

§ 1447. **The same subject continued.**—If the statute law is silent on the subject, three conditions must concur to make a municipality liable to refund taxes paid to a collector:— (1) The payment must have been illegal and void; (2) the tax must have been paid under compulsion or the legal equivalent; (3) it must have been received to the use of the municipality.¹ But it is a well-settled principle that money voluntarily paid through ignorance or mistake, with a full knowledge of the facts, cannot be recovered;² and taxes voluntarily paid are not recoverable in the absence of statute, the only remedy being an appeal to the legislative authority.³

¹ *Lyons v. Cook*, 9 Ill. App. 543; *Shoemaker v. Grant*, 36 Ind. 175. *First Nat. Bank v. Americus*, 68 Ga. 119; *Winter v. Montgomery*, 65 Ala. 403. And there must be actual payment. *Savannah v. Feely*, 66 Ga. 31. See, also, *Howard v. Augusta*, 74 Me. 79; *De Fremery v. Austin*, 53 Cal. 383; *Meek v. McClure*, 49 Cal. 628; *Bank of Santa Rosa v. Chalfant*, 52 Cal. 170; *Scott v. Chickasaw*, 53 Iowa, 47; s. c., 3 N. W. Rep. 825; *Callanan v. Madison*, 45 Iowa, 561; *Brownlee v. Union*, 53 Iowa, 489. The party must not have elected to proceed in any remedy he may have had against the assessor or collector. *Ware v. Percival*, 61 Me. 391.

² *Peterborough v. Lancaster*, 14 N. H. 382; *Raisler v. Mayor*, 66 Ala. 198. Burden is on plaintiff to show lack of knowledge of illegality of tax. *Trippler v. New York City*, 17 N. Y. Supl. 750.

³ *St. Joseph v. Buckman*, 57 Ind. 96;

See *Logansport v. La Rose*, 99 Ind. 117; s. c., 8 Am. & Eng. Corp. Cas. 512. Complaint alleging that timber was taxed in the wrong district, and that action is to recover illegal taxes paid under protest, states a good cause of action. *Washburn v. Oshkosh*, 60 Wis. 453; s. c., 5 Am. & Eng. Corp. Cas. 517. A collector of taxes, when sued for money which he has failed to pay over, cannot set off a debt to himself from the municipality for which he has collected the taxes. *Waterbury v. Lawlor*, 51 Conn. 171. The question whether or not a town is legally incorporated cannot be raised by bill to enjoin the tax collector of the town from selling complainant's property for taxes levied by the town, complainant's remedy being by *quo warranto*. *Bateman v. Florida Commercial Co.* (Fla.), 8 So. Rep. 51.

CHAPTER XXXVI.

HIGHWAYS.

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§ 1448. Highway defined — Different kinds.—If a way is used for passing and repassing and is common to all, it is a highway, whether called a road, street or public square.¹ It is not essential to a highway, at common law, that it be a thoroughfare — it may be a *cul de sac*.² Piers and wharves at the end of city streets are usually mere extensions of them, which may belong to the city for the public benefit;³ and the city is as liable for their safe condition as for any other part of the street.⁴ The part of a navigable river lying within a city boundary is not a highway the city is bound to keep safe for public use,⁵ unless made so by statute.⁶ The sea shore, between high and low water-mark, is not a highway for travel on foot or in vehicles, and no one is entitled to damages

¹ State v. Eastman, 109 N. C. 785; Watertown v. Cowan, 4 Paige, 510; State v. Wilkinson, 2 Vt. 480; Thomas v. Brooklyn, 58 Iowa, 438; Macomber v. Nichols, 34 Mich. 212; State v. Long, 94 N. C. 896; State v. Smith, 100 N. C. 550.

² People v. Kingman, 24 N. Y. 559; Saunders v. Townsend, 26 Hun, 308; Peckham v. Lebanon, 39 Conn. 235; Rugby Charity v. Merryweather, 11 East, 375. In the Kingman case just cited Denio, J., said:—"Highways and streets having no issue at one extremity are quite common and indeed indispensable in many parts of the country. Take the case of roads leading into the northern wilderness of this State. They extend as far as the country is settled, where they stop and remain in that condition until the progress of the settlements warrants their further extension. If it were held they could not be laid out unless they should run quite

across the mountains to the northern slope, it would be impossible that they should ever be established. The same is true of roads laid out and extending into the original forests. . . . For similar reasons, in many cities and villages there are short streets leading to ravines and cliffs, whence there can be no outlet and where they must necessarily stop. The same is true of streets running to unnavigable waters or to points on the sea shore where there cannot be a harbor or landing place." But see Holdane v. Cold Spring, 23 Barb. 102; aff'd, 21 N. Y. 474.

³ In Matter of N. Y. Central R. Co., 77 N. Y. 248, 257; Radway v. Briggs, 37 N. Y. 256.

⁴ Macauley v. New York, 67 N. Y. 602.

⁵ Coonley v. Albany, 132 N. Y. 145; Scaman v. Mayor, 80 N. Y. 239.

⁶ Mobile County v. Kimball, 102 U. S. 691.

for any defect therein;¹ and the public have no highway along the margin of navigable rivers and lakes without express grant or prescription.² At common law the term highway includes a footway,³ but where it occurs in a statute it must be construed in the light of its context; as, for instance, in some of the Massachusetts statutes a highway is a public way within the jurisdiction of the county, in distinction from a town-way, of which a town or city has jurisdiction.⁴ No such distinction, however, prevails in the city of Boston, where under the statute all ways are to be laid in a uniform manner by the street commissioners.⁵ It is sometimes evident from the language of a statute that the word "highway" or "road" therein does not include city streets.⁶ A public alley is not a highway under the Michigan statute of 1887 giving a remedy for injuries sustained on defective streets and highways.⁷ Ordinarily bridges are merely parts of highways.⁸ At the end of this chapter there is a "Note on Periodical Highway Literature."

§ 1449. Modes of creating highways.—Public highways may be created in four ways:—(1) By proceedings under the statute; (2) by prescription which creates the presumption of a grant of the right of way for public use; (3) by dedication through offer and implied acceptance, where the principle of estoppel prevents the owner of the land from revoking his offer after the public have acted on it so long that such revocation would be a fraud on the public; (4) by dedication through offer and actual acceptance.⁹

¹ *Murphy v. Brooklyn*, 98 N. Y. 642.

² *Ledyard v. Ten Eyck*, 36 Barb. 102.

³ *Tyler v. Sturdy*, 103 Mass. 196; *Orman v. Cheworth*, 6 Mad. 163; *Rex v. Burgess*, 2 Burr. 908; *Mercer v. Woodgate*, L. R. 5 Q. B. 26.

⁴ *Boston &c. R. Co. v. Boston*, 140 Mass. 87; *Blackstone v. County Comm'rs*, 108 Mass. 68; *Butchers' Ass'n v. Boston*, 139 Mass. 290; *Denham v. County Comm'rs*, 108 Mass. 202; *Valentine v. Boston*, 22 Pick. 75.

⁵ *Commonwealth v. Boston*, 16 Pick. 442.

⁶ Act of Pennsylvania of May 8, 1889, entitled "An act fixing the number of road and bridge viewers," does not apply to the city of Philadelphia. It is apparent, for various reasons, that it was not intended that the term "road" should embrace city streets. *Sewer Street*, 8 Pa. Co. Ct. Rep. 226.

⁷ *Face v. Ionia City*, 90 Mich. 104.

⁸ *Huggans v. Riley*, 125 N. Y. 88, 92; *Westfield Borough v. Tioga County*, 150 Pa. St. 152.

⁹ In *Cohoes v. Delaware Canal Co.*, 47 N. Y. St. Rep. 612 (Oct., 1893), it ap-

§ 1450. Dedication of highway — Nature and requisites.

The dedication of land for a highway is essentially of the nature of a gift, and there can be no gift without surrender by

peared that in 1835 the Cohoes Company, owner of the *locus in quo*, kept at its office a map upon which the land in question was designated as Van Rensselaer street, and filed a copy in the Albany county clerk's office. It sold lots and bounded them on the street, which was mapped as eighty feet wide, and for nearly its whole length and on its west side an open canal thirty feet wide. In 1853 a railroad company of which defendant is successor, having agreed with the Cohoes Company as to location and damages, filed a map designating the street in the same manner. From 1845 persons drove along the part of the street not occupied by the railroad tracks. The city of Cohoes was incorporated in 1869, and in 1874 its common council passed a resolution declaring Van Rensselaer street a public highway, and that the same be graded, but only a small portion of it was ever worked. In 1883 the Cohoes Company conveyed to defendant all its interest in the street. In an action between the city and the defendant canal company the Court of Appeals, reversing the courts below, held that Van Rensselaer street became a public highway by dedication in 1853, and had never ceased to be such. Vann, J., speaking for the court, said:—"Public highways may be created in four ways:—1. By proceedings under the statute. 2 R. S., 8th ed., p. 1372 *et seq.*; also p. 1383, § 100. 2. By prescription, or when land is used by the public for a highway for twenty years, with the knowledge but without the consent of the owner. The presumption of a grant of the right of way springs from the mere lapse

of said period of time in connection with the adverse user by the public.

3. By dedication through offer and implied acceptance, or where the owner throws open his land, intending to dedicate it for a highway, and the public use it for such a length of time that they would be seriously inconvenienced by an interruption of the enjoyment. This rests upon the principle that the owner is estopped from revoking his offer after the public have acted on it for so long a period that it would be a fraud upon them if he were permitted to do so. No particular length of time is required to effect such a dedication, as every case of an estoppel *in pais* necessarily depends upon its own facts. 4. By dedication through offer and actual acceptance, or where the owner throws open his land and by acts or words invites acceptance of the same for a highway, and the public authorities in charge of the subject formally or in terms accept it as a highway. In the absence of an actual conveyance the owner does not part with his title to the land, but only with the right to possession for the purpose of a highway. Though there has been some conflict of opinion upon the subject, we understand this to be the law as established by the weight of authority in this State. *Flack v. Green Island Village*, 122 N. Y. 107, 118; s. c., 33 N. Y. St. Rep. 339; *Driggs v. Phillips*, 103 N. Y. 77; s. c., 3 N. Y. St. Rep. 69; *People v. Loehfelm*, 102 N. Y. 1; *Cook v. Harris*, 61 N. Y. 448, 454; *Holdane v. Cold Spring*, 21 N. Y. 474; *McMannis v. Butler*, 51 Barb. 436; *Carpenter v. Gwynn*, 35 Barb. 395; *Wiggins v. Tallmadge*, 11 Barb. 457; *Clements*

the donor and acceptance by the donee.¹ A most satisfactory mode of dedication is effected by the owner's deed, and such a deed is not affected by subsequent condemnation proceedings.² It is not essential that the dedication be in writing;³ but if not, the owner's acts and declarations must be clear and decisive showing his intent to dedicate the land absolutely to the public use.⁴ The gift or dedication by the land-owner may be proved by a map made or referred to by him laying out the street for the public use,⁵ or by his bond binding him to convey the land for a highway,⁶ or by his fencing it off as a street and consenting to its designation as such on the village map,⁷ though his title to the land may not have been formally divested.⁸

v. West Troy, 10 How. Pr. 199; *Ward v. Davis*, 3 Sandf. 502; *Hunter v. Sandy Hill*, 6 Hill, 407; *Denning v. Roome*, 6 Wend. 651; *Colden v. Thurbur*, 2 Johns. 424. The same rule prevails in the Supreme Court of the United States, in the courts of most of the States, and in England. *Cincinnati v. White*, 6 Pet. 431; *Barclay v. Howell*, 6 Pet. 499; *Buchanan v. Curtis*, 25 Wis. 99; *Marcy v. Taylor*, 19 Ill. 634; *Greene v. Town of Canaan*, 29 Conn. 157; *Kennedy v. Le Van*, 23 Minn. 513; *Waterloo City v. Union Mill Co.*, 72 Iowa, 437; *State v. Track*, 6 Vt. 355; *Abbott v. Mills*, 3 Vt. 521, 526; *Hobbs v. Lowell*, 19 Pick. 405; *State v. Hill*, 10 Ind. 219; *Price v. Town of Breckenridge*, 92 Mo. 379; *Wolf v. Bross*, 72 Tex. 133; *Commonwealth v. McDonald*, 16 Serg. & R. 390; *Doe v. Jones*, 11 Ala. 64, 84; *Dovaston v. Payne*, 2 Sm. L. Cas. 142, 153, note; *Rugby Charity v. Merryweather*, 11 East, 375, n; *The King v. Leake*, 5 B. & Ad. 469; *Lade v. Shepherd*, 2 Str. 1004; *Jarvis v. Dean*, 3 Bing. 447; *Woodger v. Hadden*, 5 Taunt. 126; *Regina v. Petrie*, 30 Eng. L. & Eq. 207. There are some cases holding otherwise and others that have been supposed to

hold otherwise, but upon examination it will be found that they depended on local statutes or special circumstances. *Underwood v. Stuyvesant*, 19 Johns. 181; *Laws 1787*, ch. 61, 88; *Laws 1797*, ch. 43; *Laws 1799*, ch. 70; *Oswego v. Oswego Canal Co.*, 6 N. Y. 257, 266; *Laws 1811*, ch. 231."

¹ *Flack v. Green Island Village*, 122 N. Y. 107; *Cook v. Harris*, 61 N. Y. 448.

² *Parker v. St. Paul*, 47 Minn. 317.

³ *Vandemark v. Porter*, 40 Hun. 397; *Marble v. Whitney*, 28 N. Y. 297.

⁴ *Niagara &c. Bridge Co. v. Bachman*, 66 N. Y. 261.

⁵ *People v. Loehfelm*, 102 N. Y. 1; *Bissell v. N. Y. Central R. Co.*, 23 N. Y. 61; *Story v. N. Y. El. R. Co.*, 90 N. Y. 122.

⁶ *Cook v. Harris*, 61 N. Y. 448.

⁷ *Holdane v. Cold Spring*, 21 N. Y. 474.

⁸ Where a street in New York city was widened from forty to sixty feet and accordingly used by the public for nineteen years, though no legal measures had been taken to divest the owner's title, it was held that his non-claim for so long, together with

§ 1451. **Dedication continued — Evidence and presumptions.**—The mere reference by a grantor of land to an official map, whereon the land in question is designated as a street, does not amount to a dedication of it.¹ The mere making of a map which is not filed of record is not an offer to dedicate. Persons who buy on faith of the representation of the street upon the map may compel the opening of the street, but if they do not the public cannot complain.² Where, for more than five years, an owner does not object to the use of his land as a public road, the presumption is that he has dedicated the strip so used for a road;³ and this presumption is confirmed by the fact of his assisting in laying out the road;⁴ and the fencing off, so as to have it outside, of a strip of land the pub-

the payment by him of an assessment for paving the street to the full width and the recognition of the appropriation of the twenty feet, were sufficient to establish the public right to use the street to the full width of sixty feet. *Denning v. Roome*, 6 Wend. 651.

¹*Cook v. Sudden*, 94 Cal. 443. In *Cerf v. Pflieger*, 94 Cal. 131, the mere adoption by the town authorities of an official map of the town, which showed a street laid out through land in the occupation of a private person, was held not to affect his right to the land so designated as a street; and the fact that his grantees also described the land by reference to the map did not have the effect of a dedication. A street officially mapped may be as good a landmark as a street legally established, but a mere reference to it by the owner of land does not dedicate his land as a street. *In re Brooklyn Street*, 118 Pa. St. 640, where the court said: — "Where a municipality lays out streets upon the land of a citizen, it is not the act of the owner in any sense, and hence there is no necessity for an implication of a covenant against the owner to give his land to the public without

compensation, nor even to dedicate to public use. Why, then, shall these implications be made where the street is laid out by municipal action and the owner does nothing as to the public, and nothing as to his private grantee except to refer as matter of description to a street laid out but not opened by public authority."

²*People v. Reed*, 81 Cal. 70; *Cook v. Sudden*, 94 Cal. 443. The mere making of a map of one's land, on which streets and squares are denoted, followed by no dealing with the land by the owner or the public in reference thereto, is not sufficient to show a dedication. *Berry v. McComb City*, 69 Miss. 882; *Sanford v. Meridian*, 52 Miss. 383. But where in his deeds to purchasers he describes according to a plat into lots and streets, and according to a survey which has been incorporated into the city maps, a dedication is made out. *Witherspoon v. Meridian*, 69 Miss. 288. See, also, *Beatty v. Litus*, 47 N. J. L. 89, 91.

³*Plummer v. Sheldon*, 94 Cal. 533; *Patterson v. Munyan*, 93 Cal. 126.

⁴*Witter v. Damitz* (Wis.), 51 N. W. Rep. 575; *Gerberling v. Winnenberg*, 51 Iowa, 125.

lie are accustomed to use for travel, creates such a presumption;¹ but his consent that his land be used in order to reach a public road does not amount to a dedication;² nor user of the public without his knowledge, where he has continued to pay taxes upon the *locus in quo*.³

§ 1452. **Footways — Dedication, etc.**— At common law in England public footways might be created by dedication or prescription,⁴ and this is the rule in several of the States.⁵

§ 1453. **Conditional or qualified dedication — Revocation.** A conditional dedication by deed may be revoked at any time before the conditions are complied with.⁶ A presumption of revocation of a dedication from the fact of fencing up a road may be overcome by the fact that the dedication is recognized by the owner in contemporaneous deeds.⁷ An offer to dedicate land for the purpose of a highway may be qualified or made subject to a burden, and if so accepted the land becomes a highway subject to the burden; but after acceptance the dedicator cannot revoke the dedication or increase the burden except according to the terms of the reservation.⁸ A deed to a town for a public road is not invalid because the use of the road is limited to certain winter months in each year, and at other times is to be closed.⁹

¹ *Moffett v. South Park* (Ill.), 28 N. E. Rep. 975.

² *Worthington v. Wade*, 82 Tex. 26; *Ramthun v. Halfman*, 58 Tex. 551.

³ *Topeka City v. Cowee*, 48 Kan. 345.

⁴ Co. Lit. 56a; *Thrower's Case*, 1 Ventr. 208; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Queen v. Saintiff*, 6 Mod. 255; *Rex v. Burgess*, 2 Burr. 908.

⁵ *Tyler v. Sturdy*, 108 Mass. 196; *Hemphill v. Boston*, 8 Cush. 195; *Danforth v. Durrell*, 8 Allen, 242; *Chadwick v. McCausland*, 47 Me. 342; *Nudd v. Hobbs*, 17 N. H. 524; *Gowen v. Philadelphia Exchange Co.*, 5 Watts & S. 141.

⁶ *Forsyth v. Dunnagan*, 94 Cal. 438.

⁷ *Bridges v. Wyckoff*, 67 N. Y. 130, 132.

⁸ *Cohoes v. Delaware &c. Canal Co.* (Oct. 1892), 47 N. Y. St. Rep. 612; *People v. Kingman*, 24 N. Y. 559; *Ayres v. Penn. R. Co.*, 52 N. J. Law, 405; s. c., 48 N. J. Law, 44; *Cornwell v. Comm'rs*, 10 Exch. 771; *Le Neve v. Mile End*, 8 El. & Bl. 1054; *Fisher v. Prowse*, 2 Best & S. 770; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Arnold v. Blaker*, L. R. 6 Q. B. 433; *St. Mary's &c. v. Jacobs*, L. R. 7 Q. B. 47; *Arnold v. Holbrook*, L. R. 8 Q. B. 96.

⁹ In *Hughes v. Bingham* (Oct. 1892. N. Y.), 46 Alb. L. J. 517, the Court of Appeals said: — "To say that while the town or the commissioner has capacity to take a grant of land for general highway purposes, it is utterly without capacity to take a limited or qualified grant to supply such

§ 1454. **Acceptance of highway — Nature of.**—A public record of a judgment establishing the acceptance is not necessary to prove acceptance by the public, but it may be proved by the acts and conduct of the authorities adopting it as a highway,¹ though such acts occur on a single day,² or it may be proved by appropriation and long public use.³ However clear and decided the dedication may be, it may be revoked at any time before acceptance.⁴ An acceptance more than twenty years after offer of dedication, the owner having meanwhile resumed possession, is too late.⁵ Dedication and acceptance create a highway without regard to the length of time it may have been used.⁶

§ 1455. **Dedication by State, by cities.**—The State may dedicate its land for a highway and is as much bound thereby as an individual.⁷ Where the State by authority of law makes

a public necessity as may, and probably in many cases does, exist during the winter months, is to fix a limit upon power conferred for the public good that would be quite unreasonable if not absurd. There were seven months of the year in which the public had no use for this road, and it was provided that during these months the gates should be kept closed. This was the season of the year, however, when it is possible to make repairs on roads, and it was stipulated that the highway commissioner might then make such repairs or do such work on the road as he thought the public interest required. The capacity to take a grant in fee for highway purposes must, upon every just principle of construction, as well as upon reasons growing out of the necessity of the case, be deemed to include the power and capacity to take an interest less than a fee, or upon conditions such as were inserted in this deed."

¹ *People v. Loehfelm*, 102 N. Y. 1.

² *Hunter v. Sandy Hill*, 6 Hill, 407.

³ *Cook v. Harris*, 61 N. Y. 448; *McMannis v. Butler*, 51 Barb. 436;

Hunter v. Sandy Hill, 6 Hill, 407; *Porter v. Attica*, 33 Hun, 605. In *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, it was held the evidence justified the finding that the street in question had been dedicated to and accepted by the public, where it appeared that the street had been open forty years as a principal street, water mains laid through it and curbstones placed along the sidewalks at the village expense. Twenty years of continuous use will create the presumption of dedication, but a much shorter period will be sufficient where the act of the owner is clear and followed by immediate public use. *Denning v. Roome*, 6 Wend. 651.

⁴ *Holdane v. Cold Spring*, 21 N. Y. 474. But whether the dedicator's acts in a given case amount to revocation is a question for the jury. *McMannis v. Butler*, 51 Barb. 436.

⁵ *People v. Reed*, 81 Cal. 70.

⁶ *Chapman v. Swan*, 65 Barb. 210.

⁷ *Oswego City v. Oswego Canal Co.*, 6 N. Y. 257, where the court said:—"In laying out the village plat and in

a city plat of its own land and thereby dedicates to the public use the streets and other public grounds marked thereon, that act is itself an acceptance by the public.¹ The city of New York may dedicate its land for streets so as to be irrevocably bound thereby.² While legislative authority to individuals or corporations to fill up and enjoy land under water fronting lands owned by them does not extinguish the public right of access to navigable waters by a street on the lands of such owners which by dedication terminated at high-water line,³ yet the federal Supreme Court has decided that a grant in fee by the State of New Jersey, under her general riparian act of 1869, wholly excluded the public from such access, and that in face of such a grant a highway running to the original water line will not be continued to the new water line formed by filling in the granted area.⁴ A town in its corporate capacity may take lands for a highway by a conveyance;⁵ and such a conveyance to a town is not invalid because the use of the road is limited to certain winter months.⁶

§ 1456. The subject of dedication continued.—It is a well-settled rule⁷ that when the owner of a tract of land lays it out into city or village lots intersected with streets, alleys and public squares, and makes a map thereof, and conveys the lots with reference to their designation on the map, the map becomes an essential part of the conveyance, and the use of the streets, alleys and squares becomes an easement annexed to the estate granted.⁸ In such cases, as between the grantor and grantee, the dedication is complete

selling the building lots the State acted as the owner of the land, and the effect of the survey and sale in reference to the streets laid down on the maps was the same as if the sale and survey had been made by an individual.”

¹ Reilly v. Racine City, 51 Wis. 526.

² A city having power to lay out and open streets and to acquire land for that purpose has power to dedicate its own lands to such a use and to bind itself to grantees of abutting lands that lands so dedicated shall be

forever kept as a public street. Story v. N. Y. El. R. Co., 90 N. Y. 122.

³ Hoboken Land Co. v. Hoboken, 36 N. J. Law, 540.

⁴ Hoboken v. Pennsylvania R. Co., 124 U. S. 656.

⁵ Vail v. Long Island R. Co., 106 N. Y. 283.

⁶ Hughes v. Bingham (N. Y., 1892), 32 N. E. Rep. 78.

⁷ §§ 1450, 1451, *supra*.

⁸ Post v. Pearsall, 22 Wend. 425, 435; Taylor v. Hopper, 62 N. Y. 649.

on the delivery of the conveyance, and as to the public it is complete on adoption and user by the public authorities.¹ This whole subject has been so clearly treated by the Superior Court of the City of New York in a very recent case in connection with the use of an alley appurtenant to lots granted by the late Alexander T. Stewart, that, although this is not a court of last resort, it seems proper to quote at length from the opinion.²

¹ *De Witt v. Ithaca Village*, 15 Hun, 568; *Matter of Ingraham*, 4 Hun, 495; *Strong v. Brooklyn*, 68 N. Y. 1; *Niagara &c. Bridge Co. v. Bachman*, 66 N. Y. 269.

² *Knabe v. Seville* (December, 1892), in *New York Law Journal* of January 14, 1893, where the court said:—"It appears that Stewart, the common source of title, devoted the alley to the use of the abutting lots, the right to continue forever. He laid the alley out on his map, and marked out the lots abutting on it, and sold them in conformity to that map, and in this way dedicated the alley to the use of the adjoining land. 5 Am. & Eng. Encyc. of Law, 395 *et seq.* Indeed, where lots are sold according to a plat, with streets and alleys laid for the use of the owners of such lots, such streets and alleys are, as between grantor and grantee, dedicated to the use of such owners and to the public when it desires them for public use; and the fact that they have not been accepted as public highways renders them none the less dedicated to the use of such owners. *Trustees v. Cowen*, 4 Paige, 510; *Livingston v. Mayor*, 8 Wend. 85; *Matter of Eleventh Ave.*, 81 N. Y. 436; 3 Wash. on Real Property, 451; *Rummel v. Railroad Co.*, 30 St. R. 235; s. c., 9 N. Y. Supl. 404; *Story v. Railroad Co.*, 90 N. Y. 122; s. c., with note, 11 Abb. N. C. 236; *Coe v. Bearup*, 14 Week. Dig. 246; *De Witt v. Village*,

15 Hun, 568. As between the parties the dedication is complete upon the delivery of the deed; as to the public, upon an acceptance by the public authorities, which may be shown by use of the lands so dedicated. *De Witt v. Village*, *supra*. The principle on which the dedication is held irrevocable is that to allow it to be recalled to the injury of one who purchased adjoining land on the faith of it would operate as a fraud. *Herman on Estoppel*, § 521. At common law (and in the absence of a statutory dedication) the highway is an easement merely, and the land-owner has all the rights of property in the soil of the highway, but subject to the easement. He may mine under it, carry pipes beneath it or run a drain under it. He may also have an action of trespass against any one cutting trees or digging up the soil. 9 Am. & Eng. Encyc. of Law, 374, 375, and cases cited. Where an easement in land is dedicated to public use, the public have no right in the land inconsistent with such use and cannot convey it away. 9 Am. & Eng. Encyc. of Law, 412. Substantially the same rules apply to private alleys. *Cihak v. Klekr*, 17 Ill. App. 124; *Cox v. James*, 59 Barb. 144; *Same v. Same*, 45 N. Y. 557; *Perry v. Cumberson*, 39 Hun, 436; *Child v. Chap-pel*, 9 N. Y. 246; *Hargro v. Hodgdon*, 89 Cal. 623; s. c., 26 Pac. Rep. 1106; *Wiggins v. Tallmage*, 11 Barb.

§ 1457. **Immemorial public user of highways.**—The country is now so old as to furnish instances of immemorial public user of highways running back to colonial times,

457. While it is an established principle that nothing passes as an incident to the grant of an easement but what is requisite to its fair enjoyment, the plaintiffs seek to maintain a recovery on the theory that the plaintiffs have some estate in the alley acquired by the dedication of the alley. They claim:—(1) That when Stewart by the terms of his deeds to the abutting owners set apart this alley for the use of said lots 'forever,' he intended to dedicate it for that purpose, and did not intend to retain the ownership of the soil. *Welsh v. Taylor*, 31 N. E. Rep. 896. That not having reserved any fee in the alley, the doctrine of dedication concludes him from asserting his former title (*Gerard on Titles* (3d ed.), 736) on the equitable principle of estoppel. *Gerard on Titles* (3d ed.), 736; *Wiggins v. McCleary*, 49 N. Y. 346; *Taylor v. Hopper*, 2 Hun, 646; affirmed, 62 N. Y. 649. The trend of argument leads to the conclusion that the fee in the alley (subject to the easements) remained in Stewart until all the adjoining lots were sold and conveyed, and was then held in abeyance, or *in gremio legis* or else *in nubibus*, subject to any formal abandonment of the alley as such, when the fee would rest in the abutting owners at the time as tenants in common. *Adams v. Railroad Co.*, 11 Barb. 453; reversed, but on other grounds, 10 N. Y. 328; *Kelsey v. King*, 1 Trans. App. 137. Owners of land bounded on an alley who have free use thereof have substantially the same rights therein that the public has in its highways; and if the alleyway is abandoned, the soil belongs to them as tenants in common

(*Ellis v. Am. Acad.*, 120 Pa. St. 608; s. c., 6 Am. St. Rep. 739), and until such formal abandonment the interest of the abutting owners is of an incorporeal nature, only passing as appurtenant to any grant of the fee of the abutting property to which it is an incident. Where the title of the owner of the fee extends to the middle of the public highway, his grant of an abutting lot may carry title to the center of the street (*Dunham v. Williams*, 37 N. Y. 251), depending on the intention of the parties as evidenced by the words of the grant. Thus, a grant bounding 'by,' 'on' or 'along' a highway carries the fee to the middle if the grantor owned to the middle, but one bounding 'by the side of,' 'by the margin of' or 'by the line of' does not carry beyond the edge of the road. 9 Am. & Eng. Encyc. of Law, 375; *Gerard on Titles* (3d ed.), 518; *Holloway v. Delano*, 64 Hun, 27, 34; *In re Sixty-seventh St.*, 60 How. Pr. 264; *In re Ladue*, 118 N. Y. 213. So in regard to a lane between two closes used as a way, the presumption is that the soil *ad medium filum viae* belongs to the owner on each side. But in this, as in the case of a highway, the intention as evidenced by the words, boundaries and terms of the grant control. Dedication is the act of devoting or giving property for some object or purpose and in such a manner as concludes the owner, but he is never concluded beyond the object or purposes specified. Implied covenants are always confined within the limits of express covenants, for '*expressio unius est exclusio alterius.*' *Broom's Maxims.*"

though in many of such instances the highway may have had its origin in a statute or a deed of gift.¹ As to such user a witness may testify from common reputation or tradition, for the easement of a highway is a public easement and provable as such by reputation.²

§ 1458. Acquiring streets by prescription.— User to create a title by prescription to a public street must be under a claim of right by the public adverse to the owner's right, and continued substantially for a period equal to the statutory limitation in respect to actions for the recovery of real estate.³ Though the use of a road was begun by permission, if the use continues under a claim of right for a term equal to the period of the statute of limitations, a prescriptive right to the road is acquired.⁴ Where adjoining land-owners agree upon their division line and establish a road supposed to be on the land of one of them, the subsequent public prescriptive right to it acquired by sufficient user will not be affected though a resurvey show that the road was taken from the land of another of the adjoining owners.⁵

¹ According to the colonial act of June 20, 1765, there existed a public highway six rods wide, extending through the Elizabethtown Point tract to the waters of Arthur's Hill. *Elizabeth City v. N. J. Central R. Co.*, 53 N. J. Law, 491. See, also, *Hampson v. Taylor*, 15 R. I. 83.

² A witness for the plaintiff, in an action against a city to recover damages for personal injuries resulting from a defective sidewalk, may testify that the street where the accident occurred was a highway; that, according to common reputation and tradition, it had been such for nearly two hundred years; and that it was formerly the main street of the city. *Hampson v. Taylor*, 15 R. I. 83, 87. In this case the witness also testified that the land comprising the town was originally bought by four proprietors, and that they deeded to the

town certain highways as main streets, of which the street where the injury occurred was one. See, also, *Grandville v. Jenison*, 84 Mich. 54.

³ *Moore v. Waco City (Tex.)*, 20 S. W. Rep. 61; *Topeka City v. Cowee*, 48 Kan. 345; *Shellhouse v. State*, 110 Ind. 509; *Wallace v. Fletcher*, 30 N. H. 434; *State v. Mitchell*, 58 Iowa, 567; *Graham v. Hartnell*, 10 Neb. 518. See *Herhold v. Chicago*, 108 Ill. 467; *Jones v. Davis*, 35 Wis. 376. A lane traveled continuously by the public for forty years comes within the Indiana statute (*Louisville & c. R. Co. v. Etzler (Ind.)*, 30 N. E. Rep. 32); and within the Iowa statute. *McAllister v. Pickup (Iowa)*, 50 N. W. Rep. 556.

⁴ *McAllister v. Pickup (Iowa)*, 50 N. W. Rep. 556.

⁵ *Bales v. Pidgeon*, 129 Ind. 548; s. c., 20 N. E. Rep. 34.

§ 1459. The same subject continued— Prescription in various States.— The user required within the meaning of the provision of the New York Revised Statutes declaring that “all roads not recorded which have been or shall have been used as *public highways* for twenty years or more shall be deemed public highways” does not need to be adverse or such as is required to give an individual a right of way by prescription, but it must be like that of highways generally; the fact that a portion of the public have traveled over it for more than twenty years is not enough; it must in addition be kept in repair or taken in charge or adopted by the public authorities.¹ If the owner permits such complete public user as that above described to continue twenty years, he will not be permitted to question the public right to the highway, but by force of the statute it will be a public highway though he may not have intended it to become so;² and the rule is the same where successive owners have permitted such user for twenty years.³ But an owner will not be deemed to invite and permit such user by merely removing his fence and leaving a strip of land open.⁴ Nor can he by throwing his land open, or by a simple act of dedication, impose on a town or city the duty of treating it as a highway or a liability for neglecting to do so.⁵ By the statute of 1864 the highway laws before specially applicable to the counties of Suffolk and Queens were repealed, and by the statute of 1865 the general statute above referred to was applied to those counties, so

¹ *Spier v. New Utrecht*, 121 N. Y. 420; *In re Bridge*, 100 N. Y. 642; *Rozell v. Andrews*, 103 N. Y. 150. See, also, *Lewis v. N. Y. &c. R. Co.*, 123 N. Y. 496, 502; *Vandemark v. Porter*, 40 Hun., 397.

² *Spier v. New Utrecht*, 121 N. Y. 420, 430; *Galatian v. Gardner*, 7 Johns. 106; *Chapman v. Swan*, 65 Barb. 210.

³ *Deompeck v. Kumbert*, 44 Barb. 596.

⁴ *Rozell v. Andrews*, 103 N. Y. 150.

⁵ *Rozell v. Andrews*, 103 N. Y. 150; *Jordan Village v. Otis*, 37 Barb. 50, 56. In *Oswego v. Oswego Canal Co.*,

6 N. Y. 257, Ruggles, C. J., said:— “The whole structure of the highway acts forbids that the town is bound to accept and keep in repair any road which an individual may think proper to open through his land, although he may dedicate it to public use in such a manner as to preclude him from shutting it up. Streets and roads dedicated by individuals to public use, but not adopted by the local public authorities, are not highways within the meaning of the highway acts, and there is no law by which any one can be compelled to keep them in repair.”

that a road there which had then been used as such for twenty years at once became a public highway.¹ Under the Indiana statute, also, twenty years' public user of a way makes it a public highway, whether the owner consents or objects to the user,² and regardless of any public utility.³ In Missouri ten years user with the owner's consent makes a way a public road.⁴ By user of twelve to fifteen years a road is acquired by prescription so as to bar an owner's claim for damages.⁵

§ 1460. Appropriating land for highway — Damages.—The taking of property for a public street is a taking for public use.⁶ Where the mayor and city council have charter power to determine the necessity of proposed streets, an ordinance providing for the opening of a street is conclusive of its public necessity.⁷ If the benefits which will accrue to a land-owner from the opening of a road through his land are sufficient to counterbalance the injury to him, damages therefor should be denied to him.⁸

§ 1461. Laying out highway — Compliance with statute.—An order laying out a road which gives the center line accurately and specifies the width on each side of such line is sufficient.⁹ The mode prescribed by statute for awarding damages for laying out a road must be carefully followed.¹⁰ The proceedings of a highway commissioner in laying out a highway over petitioner's lands, without making him a party,

¹ *James v. Lammis*, 132 N. Y. 239.

² *Strong v. McKeever*, 102 Ind. 578, disapproving *Board &c. v. Huff*, 91 Ind. 333.

³ *Washington Ice Co. v. Hay*, 103 Ind. 48.

⁴ *State v. Proctor*, 90 Mo. 334.

⁵ *Click v. Lamar County*, 79 Tex. 121.

⁶ *State v. Engelmann*, 106 Mo. 628; *Savannah v. Hancock*, 91 Mo. 54; *Kansas City v. Baird*, 98 Mo. 218.

⁷ *State v. Engelmann*, 106 Mo. 628; *Kansas City v. Baird*, 98 Mo. 218.

⁸ *Lingo v. Burford* (Mo., 1892), 20 S. W. Rep. 459; *Daugherty v. Brown*, 91 Mo. 26; *Jackson County v. Waldo*,

85 Mo. 640; *Ragan v. Railroad Co.* (Mo., 1892), 20 S. W. Rep. 234.

⁹ *People v. Haverstraw*, 47 N. Y. St. Rep. 891; *Van Bergen v. Bradley*, 36 N. Y. 316; *Herrick v. Stover*, 5 Wend. 581; *Tucker v. Rankin*, 15 Barb. 471. An order laying out a highway through cultivated land, signed by two of the highway commissioners and not reciting that the third participated in the proceedings or was notified to do so, is void. *People v. Hynds*, 30 N. Y. 470; *Chapman v. Swan*, 65 Barb. 210.

¹⁰ *People v. Haverstraw*, 47 N. Y. St. Rep. 891; *State v. Town Board* (Wis.), 51 N. W. Rep. 953.

are invalid and will be quashed.¹ Where a new highway is laid out to take the place of an old one the public cannot be deprived of the old until the new is made fit for travel.² Under the Wisconsin statute a committee of the county board cannot make an order laying out a highway, but must report to the board, which thereupon makes the order.³ In Texas the county commissioners have no jurisdiction to open a highway within the corporate limits of a city, and the city council's ratification of such an opening does not affect the title of an owner of land which is appropriated for such highway.⁴ The incorporated boroughs of New Jersey have exclusive power to lay out highways within their respective limits, and the general road law is not operative within them.⁵ No appeal lies to the township board from a highway commissioner's refusal to lay out a highway.⁶

§ 1462. The same subject continued.—A town sued by reason of a defective highway may deny its existence if not established in accordance with the statute.⁷ But the fact that the selectmen did not conform to such merely directory requirements as filing and recording will not avail the town.⁸

¹ *Sherman v. Highway Comm'rs* (Mich.), 51 N. W. Rep. 1122.

² *Witter v. Damitz* (Wis.), 51 N. W. Rep. 575.

³ *Gillett v. McGonigal*, 80 Wis. 158.

⁴ *Norwood v. Gonzales County*, 79 Tex. 218; *State v. Jones*, 18 Tex. 874.

⁵ *In re Piscataway Townships* (N. J.), 24 Atl. Rep. 759.

⁶ *Wilson v. Board of Burr Oak*, 87 Mich. 240.

⁷ In an action against a town on the New Hampshire statute of highways, by a traveler injured, the town is not estopped to deny the existence of the way if it was not established in a statutory method. *Wentworth v. Rochester*, 63 N. H. 244. A dedication to the county by the land-owners on each side of land sufficient for the purposes of a road, and an acceptance thereof by the board of county commissioners, accompanied by their

declaration that the land dedicated shall constitute a county road, is in disregard of the proceedings prescribed by statute concerning roads and highways, and does not make the strip of land dedicated a county road, or a regularly laid out road. *Oliphant v. Commissioners*, 18 Kan. 386, cited and followed. *Barker v. Hovey* (Kan.), 26 Pac. Rep. 585.

⁸ In an action against a town for injuries on a highway, the fact that the selectmen's certificate of the laying out was not recorded and returned within the thirty days required by statute, held not to avail the town as showing that there was no legal highway. *Randall v. Conway*, 63 N. H. 513; *Hayes v. Hanson*, 12 N. H. 290; *Smith v. Bradley*, 20 N. H. 117; *Converse v. Porter*, 45 N. H. 385; *Pond v. Negus*, 3 Mass. 230; *Williams v. School Dist.*, 21 Pick. 75; *Jackson*

§ 1463. **Laying out — Property exempt from.**— In many States certain designated property is exempt by statute from appropriation for highways, as, for example, gardens and orchards and manufacturing establishments.¹ Such statutes will be liberally construed in favor of the highway and highway officers,² and the burden is on him who objects to the appropriation of his property to show that it is exempt.³ An order laying out a highway cannot be attacked collaterally, though it depart from the line described in the petition.⁴ An owner may waive his objections to the taking of his property by acquiescence and accepting damages therefor.⁵

§ 1464. **Laying out— Private owner's rights.**— In laying out a highway reasonable care should be exercised to avoid injury to private property, but the road officers are not trespassers if they give owners a sufficient opportunity to remove their property from the *locus in quo*.⁶ An officer will be a trespasser if he removes private fences without the express authority of the statute.⁷ Where the statute requires notice to be given to owners to remove their fences, the officer who proceeds to lay out the highway without giving such notice will be a trespasser, but the order establishing the road will not be invalidated.⁸ The width of a highway ac-

v. Young, 5 Cow. 269. Although the Revised Statutes of 1881, section 5028, provide that "no county road shall be less than thirty feet wide," the enforcement of an order establishing a road will not be enjoined because the proposed road is to be only twenty feet wide where it borders the boundary of a city, since the order cannot be collaterally attacked; and it will be presumed, in the absence of allegations to the contrary, that it was intended to make a road of the proper width by co-operating with the city authorities. *Chicago & A. Ry. Co. v. Sutton* (Ind. Sup.), 30 N. E. Rep. 291.

¹ *People v. Greensburg*, 57 N. Y. 549; *Snyder v. Plass*, 28 N. Y. 465; *Snyder v. Trumbour*, 38 N. Y. 355; *People v. Dutchess*, 23 Wend. 360;

Clark v. Phelps, 4 Cow. 190; *People v. Kingman*, 24 N. Y. 559. See *Bass v. Fort Wayne*, 121 Ind. 389; s. c., 23 N. E. Rep. 259.

² *Bass v. Fort Wayne*, 121 Ind. 389.

³ *People v. Kingman*, 24 N. Y. 559; *Lansing v. Carroll*, 4 Cow. 190.

⁴ *Davenport & Co. Assoc'n v. Schmidt*, 15 Iowa, 213; *Humboldt County v. Dinsmore*, 75 Cal. 604.

⁵ *Hitchcock v. Danbury R. Co.*, 25 Conn. 516; *Chatterton v. Parrott*, 46 Mich. 432; *Felch v. Gilman*, 22 Vt. 38; *Hatch v. Hawkes*, 126 Mass. 177.

⁶ *Wight v. Phillips*, 36 Me. 551.

⁷ *Campbell v. Kennedy*, 34 Iowa, 494. See, also, *Cool v. Crommet*, 13 Me. 250; *Stackpole v. Healy*, 16 Mass. 33.

⁸ *Rutherford v. Davis*, 95 Ind. 245; *Ruston v. Grimwood*, 30 Ind. 364.

quired by adverse user for the statutory period is not necessarily confined to the track made by passing vehicles, but may include such adjacent land as may be needed for ordinary repairs and improvements.¹ A person may so purchase a lot in reference to a surveyor's plat of a street as to be estopped from denying the existence and width of the street.² An individual will not be allowed to interfere with the opening of a highway on the ground of some inconvenience to him.³

§ 1465. Proceedings to establish highways — Parties — Notice.—Interested land-owners must be parties to proceedings to establish and open highways in order that they may have an opportunity to be heard.⁴ The general rule is that only those who have title of record need be parties, but others having a proprietary claim or color of title should also be parties.⁵ As between vendor and vendee, whichever holds the legal title should be made the party.⁶ The owner of a vested estate, whether present, or in remainder or reversion, should be a party.⁷ The trustee, and not the beneficiary, should be a party;⁸ and mortgagees of the owner,⁹

¹ *Marchand v. Town of Maple Grove* (Minn.), 51 N. W. Rep. 606.

² Where a land company has its land surveyed and a plat thereof made, fully setting forth the width, location and course of the streets, avenues, alleys and lots into which the lands were divided, and then sells a part of such land, describing it as "beginning at the center of intersection of Twentieth street and Seventh avenue south thence westward along said avenue . . . to the center of Eighteenth street; thence southward along said street; . . . thence eastward at right angles thereto; . . . thence northward along Twentieth street . . . to the beginning," — the purchaser is estopped from disputing the existence and width of the streets as surveyed; and, though he is the first lot purchaser in that part of the survey, by entering into his purchase with reference to the surveyor's plat, he per-

fects the offered dedication and establishes the streets, at least those contiguous to his purchase, as public highways. *Reed v. City of Birmingham* (Ala.), 9 So. Rep. 161.

³ *Randall v. Christianson*, 76 Iowa, 169.

⁴ *Kingston v. Towle*, 48 N. H. 57; *Duncan v. Terre Haute*, 85 Ind. 104.

⁵ *Anderson v. Pemberton*, 89 Mo. 61; *Sherwood v. St. Paul R. Co.*, 21 Minn. 127; *Stoneman v. London & Co.*, L. R. 7 Q. B. 1.

⁶ *Smith v. Ferris*, 6 Hun, 553; *Curran v. Shattuck*, 24 Cal. 427.

⁷ *Shelton v. Derby*, 27 Conn. 414; *State R. Co. v. Easton R. Co.*, 36 N. J. Law, 181.

⁸ *State v. Orange*, 32 N. J. Law, 49; *State v. Easton*, 36 N. J. Law, 181; *Hawkins v. Comm'rs*, 2 Allen, 254.

⁹ *Hagar v. Brainard*, 44 Vt. 294; *Sherwood v. Lafayette City*, 109 Ind. 411; *Parks v. Boston*, 15 Pick. 198.

and both lessor and lessee,¹ and heirs of a deceased owner rather than the administrator;² but not judgment creditors of the owner unless the statute so requires,³ nor a wife having a mere inchoate interest in her husband's land.⁴ All owners in interest should have notice,⁵ but the form of notice is not important unless the statute prescribes a particular form.⁶

§ 1466. Laying out — Petition — Jurisdictional facts.—

A written petition is the proper mode of commencing proceedings for the establishment of a highway in the absence of some inconsistent statutory provision.⁷ If the statute requires a petition and none is filed no jurisdiction is obtained to lay out a highway.⁸ In order to give jurisdiction to establish a highway the statute must be carefully conformed to in drawing up the petition or it may be directly attacked.⁹ Thus a petition that a highway be "opened for travel as provided by law" confers no jurisdiction to establish a highway, for that is not its language.¹⁰ If the jurisdictional facts appear in the petition it will not be void by reason of mere irregularities.¹¹ If the petition is attacked collaterally no defect or irregularity will be fatal unless it affects the jurisdiction;¹² thus a defective notice is not a fatal irregularity.¹³ If the required number of

¹ *Parks v. Boston*, 15 Pick. 198; *v. Charlestown*, 34 N. H. 23; *Pritchard v. Atkinson*, 3 N. H. 335; *People v. Improvement Co.*, 57 N. H. 110; *Astor v. Miller*, 2 Paige, 68. ⁹ *Humboldt County v. Dinsmore*,

² *Booneville v. Ormrod*, 26 Mo. 193; *Todemier v. Aspinwall*, 43 Ill. 401. ¹⁰ 75 Cal. 604; *Cavanaugh v. Smith*, 84 Ind. 380; *Packard v. Mendenhall*, 42 Ind. 598; *Willman v. Willman*, 57 Ind. 500; *Matter of Washington Park*, 52 N. Y. 131.

³ *Gimbel v. Stolte*, 59 Ind. 446; *Houston v. Houston*, 67 Ind. 276; *Evansville Co. v. State*, 73 Ind. 219; *Dake v. Beeson*, 79 Ind. 24; *Blair v. Hanna*, 87 Ind. 298. ¹¹ *Curtis v. Pocahontas County*, 72 Iowa, 115.

⁴ *Duncan v. Lafayette*, 85 Ind. 104.

⁵ *Whitaker v. Benton*, 48 N. H. 157; *Norton v. Walkill R. Co.*, 63 Barb. 77. ¹² *Jackson v. Rankin*, 67 Wis. 285; *Winham v. Comm'rs*, 26 Mo. 406; *Dickinson County v. Hagan*, 39 Kan. 606; *Dorman v. Lewiston*, 81 Me. 411.

⁶ *Nichols v. Bridgeport*, 23 Conn. 189; *Baltimore v. Boldin*, 23 Md. 328. ¹³ *Terre Haute v. Beach*, 96 Ind. 143; *Town of Cicero v. Williamson*, 91 Ind. 541.

⁷ *Vail v. Morris & C. Co.*, 21 N. J. Law, 189; *Throop v. Forman*, 31 Mich. 144; *Commonwealth v. Peters*, 3 Mass. 229. ¹⁴ *Town of Cicero v. Williamson*, 91 Ind. 541, 545; *Muncey v. Joest*, 74 Ind. 409; *Hume v. Conduit*, 76 Ind. 598;

⁸ *State v. Morse*, 50 N. H. 9; *Clement v. Burns*, 43 N. H. 613; *Haywood*

qualified persons sign a petition the fact of an unqualified person's signing will not vitiate it.¹ The material facts must be alleged directly and not by way of recital,² and must inform the parties interested of the lands and rights affected.³

§ 1467. **The same subject continued — Objections to petition.**—All non-jurisdictional objections to a petition will be deemed waived if not promptly made.⁴ Objections to the form of a petition should be specific.⁵ If the objection does not appear on the face of the petition or complaint the grounds should be set forth in an answer.⁶ If it does so appear the objection may be made by demurrer, or by exceptions, or a motion to dismiss.⁷

§ 1468. **Abandonment of highway by non-user.**—Under the New York statute the requirement that a highway which has been laid out shall be opened and worked within six years or cease to be a highway does not require it to be finished or to be a first-class road, but it must be sufficient to enable the public to pass over it.⁸ And so a part of a road which is not used or traveled for six years, and becomes impassable for vehicles, ceases as to such part to be a highway, and the village or city is not liable for injuries thereon received.⁹ But this non-user by the public must be distinguished from such an occupation by a trespasser of a part of a highway as amounts to an obstruction or nuisance; and he cannot acquire

McAlpine v. Sweetser, 76 Ind. 78; *Carr v. State*, 103 Ind. 548; *Meranda Stout v. Woods*, 79 Ind. 108; *Kyle v. Spurlin*, 100 Ind. 380; *Anderson v. Kyle*, 55 Ind. 387. *Baker*, 98 Ind. 587; *Higbee v. Peed*, 98 Ind. 420.

¹ *Hyde Park v. County*, 117 Mass. 416.

² *Lake Shore R. Co. v. Cincinnati R. Co.*, 116 Ind. 578.

³ *Heick v. Voight*, 110 Ind. 279; *Wolsey v. Board*, 32 Iowa, 231; *State v. Prince*, 26 Iowa, 223; *Monterey v. Berkshire*, 7 Cush. 395.

⁴ *Bachelor v. New Hampton*, 60 N. H. 207; *Wells v. Rhoades*, 114 Ind. 467; *Palmer v. Highway Com'rs*, 49 Mich. 45; *Hardy v. Keene*, 54 N. H. 449; *Steele's Petition*, 44 N. H. 220; *State v. Richmond*, 26 N. H. 232.

⁵ *Udpegraff v. Palmer*, 107 Ind. 181;

⁶ *Terry v. Waterbury*, 35 Conn. 526; *Hadley v. Citizens' Sav. Inst.*, 123 Mass. 301; *Crawford v. Rutland*, 52 Vt. 412. But see *Matter of N. Y. Central R. Co.*, 66 N. Y. 407; *Corbin v. Wis. R. Co.*, 66 Iowa, 269.

⁷ *Elliott, Roads and Streets*, 257.

⁸ *Beckwith v. Whalen*, 70 N. Y. 430; 1 R. S. 520, § 99, as amended by act of 1861, ch. 311.

⁹ *Hovey v. Haverstraw*, 124 N. Y. 273; *Christy v. Newton*, 60 Barb. 332; *Lyon v. Munson*, 2 Cow. 426.

a prescriptive right to the highway by a continued occupation of twenty years.¹ A highway can be lost in whole or in part by non-user, but the portion used will not be affected by the non-user of the remainder.² In Ohio, in order that non-user may amount to abandonment, it must be shown to have continued for twenty-one years;³ and in Kentucky must continue for such period as would create a prescriptive right.⁴ An abutting owner's private rights in a street may be lost where their existence is denied and they are exclusively possessed for twenty years by one who claims to own the fee of the street.⁵ The Mississippi statute under which ten years' adverse possession of land confers title does not apply against the right of a municipality to its streets.⁶ An abutting owner who is permitted to inclose and use a street cannot acquire title thereto by prescription, as his possession is not adverse.⁷

§ 1469. Discontinuing or vacating highways.—Discontinuance of a highway can be effected only by the proper municipal authorities and according to the statutory procedure.⁸ A

¹ *Driggs v. Phillips*, 103 N. Y. 77. See *Parker v. St. Paul*, 47 Minn. 317.

² *Wayne Savings Bank v. Stockwell*, 84 Mich. 587.

³ In *Nail & Iron Company v. Furnace Company*, 46 Ohio St. 544, it was held that proof that no work had been done on a road for fifteen years, that it was at times impassable, that it passed over a steep hill, that a new road had been established to take its place, to which travel had been greatly diverted, and that portions of the old road had been fenced in by individuals, was not enough to establish an abandonment by the public. *Spears, J.*, said:—"It appears to be well settled by the authorities that in order to work abandonment by simple non-user of an easement, all acts of enjoyment must have totally ceased for the same length of time necessary to create the original prescription; and we hold that where non-user by the public of a street within a city is relied

upon as proving an abandonment of it, such non-user must be shown to have continued for a period of twenty-one years." See, also, *State v. Culver*, 27 Am. Rep. 295; *Ward v. Ward*, 7 Exch. 838; *Corning v. Gould*, 16 Wend. 531.

⁴ *Curran v. Louisville*, 83 Ky. 628.

⁵ *Woodruff v. Paddock*, 130 N. Y. 618.

⁶ *Witherspoon v. Meridian*, 69 Miss. 288; *Vicksburg v. Marshall*, 59 Miss. 563.

⁷ *Taylor v. Phillips* (West Va.), 14 S. E. Rep. 130.

⁸ *Hughes v. Bingham* (Ct. of App.), 46 Alb. L. J. 517. In *Driggs v. Phillips*, 103 N. Y. 77, 83, *Danforth, J.*, said:—"Once established a highway does not cease to be such until it has been discontinued by the proper authorities. . . . The jurisdiction of defendants in the performance of their duty extended over the whole width of the highway as established. The plaintiff takes his title subject

town in its corporate character can neither lay out nor discontinue a highway.¹ A highway once created continues to exist until vacated by the county supervisors or by operation of law or the judgment of a competent court.² The Missouri rule is that the vacating of a street under charter powers is wholly a question of expediency for the municipal council acting fairly and without fraud.³ Application for appeal to a justice from laying out or discontinuing a highway under the Minnesota statutes need not show a right to appeal.⁴ When a street is lawfully vacated the abutting owner holds the fee presumably to the center of the street discharged from all easements of the public or of other abutting owners.⁵ An abutting owner on a street is entitled to damages if the street is so closed as to deprive him of reasonable access to other streets theretofore accessible to him.⁶

§ 1470. Bridges — Part of highway, etc.—At common law a bridge is a part of the highway which it serves to make more serviceable to the public,⁷ and this is the general rule in this country.⁸ The word “bridge” as used in the Indiana statute of 1881 does not apply to a culvert or structure over a ravine made simply to drain surface water off the highway, but is used in its common-law meaning, as a structure over water flowing in a channel between banks more or less defined, although such channel may be occasionally dry, in order to facilitate public passage over the same.⁹ The Vermont high-

to the easement, and no act of ob-
struction on his part could deprive
them of their jurisdiction.” See,
also, *Bridges v. Wyckoff*, 67 N. Y.
130.

¹ *Monk v. New Utrecht*, 104 N. Y.
552, 557.

² *Plummer v. Sheldon*, 94 Cal. 533;
Babcock v. Welsh, 71 Cal. 402; *Bol-*
ger v. Foss, 65 Cal. 250.

³ *Glasgow v. St. Louis*, 107 Mo. 198;
State v. Clark, 54 Mo. 36; *Springfield*
R. Co. v. Springfield, 85 Mo. 676;
Kittle v. Freemont, 1 Neb. 328.

⁴ *State v. Simon*, 47 Minn. 315;
Anderson v. Meeker County, 46 Minn.
237.

⁵ *Lamm v. Chicago R. Co.*, 45 Minn.
71.

⁶ *Gargan v. Louisville & C. R. Co.*,
89 Ky. 212; *Smith v. Boston*, 7 Cush.
255. See *Felton v. Short Route Co.*,
85 Ky. 640.

⁷ *Rex v. Sainthill*, 2 Ld. Raym. 1174.

⁸ *Westfield Borough v. Tioga*
County, 150 Penn. St. 152; *Rapho Tp.*
v. Moore, 68 Penn. St. 404; *Penn. Tp.*
v. Perry Co., 78 Penn. St. 457;
Comm'rs v. Bridge Company, 12
Cush. 243.

⁹ *Board v. Bailey*, 122 Ind. 46;
Board v. Brown, 89 Ind. 48; *Board*
v. Legg, 110 Ind. 479.

way laws provide that the word "highway" shall include bridges thereon, and a bridge may be declared on in pleadings as a highway.¹ In this country a bridge means any structure by which a highway is carried over a place, unless the term is limited by a statute² or by some local usage, or by agreement.³ Whether an approach to a bridge, or a wing wall or other arrangement connecting it to the banks, is to be deemed a part of the bridge or of the highway, must be determined by the particular facts of each case.⁴

§ 1471. Bridges over navigable rivers and waters.—Until congress acts respecting the bridging of navigable streams within a State, the State has full power to bridge such streams, subject, however, to the power of congress at any time to abate a bridge as a nuisance to navigation and to assume entire control.⁵ It seems that a State may bridge a river and in order to meet the expense impose a general toll or tax on those who use it, provided free navigation is not thereby impaired.⁶ Congress has power to authorize a bridge over a navigable river and thereby obstruct free navigation to some extent.⁷ No compact that the States of Georgia and South Carolina may make concerning the free navigation of the Savannah river can affect the power of congress to close one of the channels of that river and to declare that an actual obstruction thereof is not illegal.⁸ Congress may withdraw its assent to a bridge, and such withdrawal is equivalent to a positive

¹ *Cook v. Town of Barton*, 63 Vt. 566.

² *Whitall v. Gloucester*, 40 N. J. L. 302, 305, 306.

³ In *Swanzy v. Somerset*, 132 Mass. 312, the word bridge as used in a statute was held to apply only to the structure which crossed a river, and its approaches, in the absence of any usage or agreement between the two towns which fixed the construction; and not to include the crossways.

⁴ Compare *Taylor v. Williston*, 62 Vt. 269, with *Powers v. Woodstock*, 38 Vt. 44.

⁵ *Willamette Bridge Co. v. Hatch*, 123 U. S. 112; *Hamilton v. Vicksburg*

R. Co., 119 U. S. 280; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Pound v. Turck*, 95 U. S. 459; *South Carolina v. Georgia*, 93 U. S. 4; *Parkersburg Co. v. Parkersburg*, 107 U. S. 691; *Welton v. Missouri*, 91 U. S. 275; *Bridge Co. v. United States*, 105 U. S. 470; *Gilman v. Philadelphia*, 3 Wall. 731.

⁶ *Sands v. Manistee Company*, 123 U. S. 288; *Huse v. Glover*, 119 U. S. 543; *Mobile County v. Kimball*, 102 U. S. 691.

⁷ *People v. Kelly*, 76 N. Y. 475.

⁸ *South Carolina v. Georgia*, 93 U. S. 4.

enactment that, notwithstanding any State legislation, the first plan of the bridge was unlawful.¹

§ 1472. Bridges between States—Between counties.—A State may authorize the building of a bridge over a boundary river, though a part of it will be in another State;² and, in the absence of anything to the contrary, the required consent of the other State will be presumed under the rules of comity which prevail between States.³ In the absence of statute one county cannot compel another to join in building a bridge over a river between them.⁴ In Nebraska the statute authorizes the county boards to enter into a joint contract to build such bridges, but in the absence of such a contract one county board cannot compel the other to join in the erection or to contribute.⁵ The legislature may authorize or require one county to build, at its sole expense, a bridge across the boundary line between it and another county.⁶ Under the Indiana statute of 1869 a bridge could be erected only by the mutual concurrence and agreement of the commissioners of the two counties interested and bounded by the stream to be bridged.⁷ In Indiana, under the amending statute of 1881, providing that where one county refused to join the other might proceed to build the bridge as if it were wholly within its territory, no action could be maintained by the county so building to recover a proportionate share of the cost from the other.⁸

¹ *Bridge Company v. United States*, 105 U. S. 470.

² It was held in *Hunt v. Kansas & Missouri Bridge Co.*, 11 Kan. 412, that the Kansas legislature had power to authorize the forming of a company to build a bridge over the Missouri river at a place where the river formed the boundary between Kansas and Missouri.

³ *Land Grant &c. Co. v. Coffey County*, 6 Kan. 245, 254; *Runyan v. Coster*, 14 Pet. 122; *Bard v. Poole*, 12 N. Y. 495.

⁴ In Kentucky where two counties differ as to the expediency of such a

bridge and one county court refuses to act, the statute makes the circuit court of the county the arbiter between them. *Garrard County Court v. Bayle County Court*, 10 Bush (Ky.), 208.

⁵ *Brown v. Merrick County*, 18 Neb. 355.

⁶ *Washer v. Bullitt County*, 110 U. S. 558, 565; *Agawam v. Hampden*, 130 Mass. 528; *Scituate v. Weymouth*, 108 Mass. 128. See, also, *Mobile County v. Kimball*, 102 U. S. 691.

⁷ *Browning v. Board*, 44 Ind. 11.

⁸ *Fountain County v. Warren County* (Ind.), 27 N. E. Rep. 133.

§ 1473. **County bridges.**—The burden of building and repairing bridges on highways in a county rests upon the county.¹ Whether the highway is necessary or not, if the bridge is necessary to its use the board of freeholders will be indictable for neglecting to keep it in safe condition.² The New Jersey statute of 1860, giving a remedy where a county or township wrongfully neglects to erect, rebuild or repair a bridge, applies only in favor of those who of right depend upon the bridge for the full and safe performance of its appropriate functions,³ and does not apply, for instance, in favor of a mill owner who has no right to depend on the bridge abutments to maintain his dam so that it will retain water.⁴ In Georgia, if a county owns a bridge within a town, it alone is responsible for neglect to repair.⁵ Where a bridge has been built by the county the expense of the approaches must also be borne by the county.⁶ At common law a county was required to repair only such bridges as crossed a stream or water-course.⁷ Under the Indiana statute of 1881 a county must build any bridge within the cities of the county the estimated cost of which exceeds \$500,⁸ but is not liable for the repairs of a bridge constructed by it if the bridge has passed under the exclusive control of a city within the county.⁹ Contrary to the policy which prevails in some other States, bridges and highways in Indiana are treated as distinct subjects of legislation. The duty of erecting and repairing bridges over water-courses is imposed on the county commissioners, while the general duty of keeping highways and bridges in repair is imposed upon township trustees and road supervisors.¹⁰

¹ *Beatty v. Litus*, 47 N. J. Law, 89; *Ripley v. Freeholders*, 40 N. J. Law, 45; *Board v. Legg*, 93 Ind. 523; *Board v. Brown*, 89 Ind. 48.

² *Board &c. v. State*, 42 N. J. Law, 263.

³ *Ripley v. Freeholders*, 40 N. J. Law, 45.

⁴ *Jernee v. Monmouth*, 52 N. J. Law, 553. See, also, *Livermore v. Freeholders*, 31 N. J. Law, 507; s. c., 29 N. J. Law, 245, where the owner of property on which the bridge fell had no remedy.

⁵ *Daniels v. Athens*, 55 Ga. 609.

⁶ *Westfield Borough v. Tioga County*, 150 Penn. St. 152.

⁷ *Whitall v. Gloucester*, 40 N. J. Law, 302, 303. See *Washer v. Bullitt County*, 110 U. S. 564; *Board v. Bailey*, 122 Ind. 46, 48; *State v. Gorham*, 37 Me. 451; *State v. Hudson County*, 30 N. J. Law, 137; *Rex v. Oxfordshire*, 20 Eng. C. L. 289.

⁸ *Wabash City v. Carver*, 129 Ind. 552.

⁹ *Spicer v. Elkhart County*, 126 Ind. 369.

¹⁰ *Board v. Bailey*, 122 Ind. 46; *Ab-*

§ 1474. **County commissioners' discretion as to erection of bridges.**—In Indiana a board of county commissioners having entered an order for the construction of a bridge which it is authorized by statute to erect has the discretion to build it or not, and will not be compelled by *mandamus* to carry the order into effect;¹ and the board has the same discretion, which will not be coerced, where a bridge is practically destroyed and the alternative is presented of repairing it or abandoning it and resorting to some other means or place in order to cross the stream.² In Pennsylvania, where county commissioners are in duty bound to construct approaches necessary to give public access to bridges, they will not be compelled so to do under conditions imposed by the dedicators of the land, or if the approach will not in fact connect with a highway.³ But generally the commissioners have no discretion in respect to repair of a necessary bridge.⁴

§ 1475. **City bridges.**—The cities of New York and Brooklyn jointly own and manage the bridge which connects them

bott v. Board, 114 Ind. 61; Board v. Rickel, 106 Ind. 501.

¹ State v. Board, 125 Ind. 247.

² State v. Greene Co. Board, 119 Ind. 444; Board v. Legg, 93 Ind. 523; Board v. State, 113 Ind. 179. In State v. Board, 119 Ind. 444, the court said:—"The duty of county commissioners to cause all bridges to be kept in repair, so as to prevent injury to persons traveling upon the highways of which they form an essential part, is in no sense discretionary. So if the use of a public highway, which constituted the only available means of communication, was substantially destroyed by the failure to repair a bridge, the question then would not be one of practical convenience but of practical necessity. Doubtless cases might arise in which it would be the imperative legal duty of the commissioners to afford the means or take the necessary steps to make the repairs. The facts found fall far short of making

the present such a case. For all that appears the stream may be crossed by means of a ford, or ferry, or another bridge—as the evidence shows the fact to be—may have been built within a reasonably convenient distance from the one destroyed."

³ Commonwealth v. Loomis, 128 Penn. St. 174, where the court said:—"The approaches at the end of the bridges have not been built, but the reason given for not building them, in the commissioners' return, seems to be quite sufficient. There is no road opened at the eastern end, with which to connect, or upon which to erect proper approaches. The commissioners had no power to build such a road, nor has the court the right to order it opened except in proper proceedings."

⁴ State v. Damaree, 80 Ind. 519; State v. Board, 80 Ind. 478; Board v. State, 113 Ind. 179.

and which they have made, and are liable for the negligent acts of the bridge trustees and of their employees;¹ but the trustees as public agents are not liable for the negligence of their employee while employed on the bridge.² Under the Massachusetts statutes of 1882 and 1887 providing for the construction of a bridge across Charles river between Boston and Cambridge, by the joint action and at the joint expense of those cities, the city of Boston has no voice or control as to the bridge avenue on the Cambridge side.³ A bridge located on a highway within the limits of a city is a part thereof, and if the city has taken charge of the highway it is liable for the bridge defects.⁴ While it is settled in Indiana that a county is liable for its defective bridges,⁵ this being the common-law rule,⁶ yet if a bridge is within a city the county is not liable for its defects unless it owns it and is charged by statute with the duty of maintaining it.⁷ Where a city has adopted a private bridge and by resolution of its common council declared it open for public travel, it cannot claim that it has no right to maintain the bridge and would be a trespasser in going upon it to make repairs.⁸ The fact that a city is permitted to use a State bridge and its approaches

¹ *Wash v. New York*, 107 N. Y. 220; *People v. Kelly*, 76 N. Y. 475.

² *Walsh v. Trustees &c.*, 96 N. Y. 427.

³ *Cambridge v. Railroad Comm'rs*, 153 Mass. 161.

⁴ Under Revised Statutes of Indiana of 1881, section 3161, giving common councils of cities exclusive control and power over streets, alleys, highways and bridges within the limits of the cities, a public bridge within the limits of and located upon a public highway of a city constitutes a part of such highway; and where the city has taken charge of the same it is liable to a person suffering injury or loss without fault or negligence, through the neglect to keep such bridge in repair; and a finding that the city had taken charge of and graded the highway upon

which the bridge was built is sufficient to sustain the conclusion that the city was liable for defects in the bridge. *City of Goshen v. Myers*, 119 Ind. 196; s. c., 21 N. E. Rep. 657; *Lowery v. Delphi City*, 55 Ind. 250; s. c., 74 Ind. 520. See, also, *People v. President &c.*, 23 Wend. 254; *People v. Comm'rs*, 4 Neb. 150; *Chicago v. Powers*, 42 Ill. 169; *Whitall v. Gloucester*, 40 N. J. Law, 302, 305.

⁵ *Board &c. v. Legg*, 93 Ind. 523; *Board &c. v. Brown*, 89 Ind. 48.

⁶ *Washer v. Bullitt County*, 110 U. S. 558, 564.

⁷ *Board &c. v. Deprez*, 87 Ind. 509; *City of Goshen v. Myers*, 119 Ind. 196; *Spicer v. Elkhart Co.*, 126 Ind. 369; *Wabash City v. Carver*, 129 Ind. 552.

⁸ *Langlois v. Cohens*, 58 Hun, 226.

does not render it liable for defects therein.¹ The city council of Augusta being a corporation chartered by the State of Georgia and owning a toll-bridge over the Savannah river between that State and South Carolina is liable for neglecting to keep the abutment on the South Carolina shore safe for customers, though by the law of South Carolina it would not be liable for such negligence.²

§ 1476. Bridges in towns and townships and boroughs.—Under the New York statute a town is primarily bound to the maintenance and repair of the bridges within it, but may recover the expense thereof from any person, or the State even, who has injured a bridge and made repairs necessary.³ Where a bridge as built is longitudinally divided by the town line the expense of rebuilding is to be borne equally by both towns;⁴ in so rebuilding a town must proceed strictly according to the statute or it may not be able to compel the other town to contribute.⁵ Though the New York legislature cannot under the State constitution pass any private or local bridge law it may confer the power of such local legislation upon boards of county supervisors, and such a board of a county having within it two towns separated by a stream, may, on proper application by one of them, enact a law compelling the erection of a bridge over such stream to connect highways in said towns, though the officers of the other town and a majority of its tax-payers have voted against the bridge at a regular town meeting.⁶ But when a town has voted money for a bridge its highway commissioner may proceed to erect it, though the county supervisors have not located it and refuse to do so,⁷ for his power to repair a highway may include the power to build a new bridge.⁸ At first in Pennsylvania the building of bridges was cast on the townships and

¹ *Carpenter v. Cohoes*, 81 N. Y. 21; *Verder v. Little Falls*, 100 N. Y. 343.

² *Augusta City Council v. Hudson*, 88 Ga. 599; s. c., 15 S. E. Rep. 678.

³ *Bidelman v. State*, 110 N. Y. 232.

⁴ *Day v. Day*, 94 N. Y. 153; *Lap- ham v. Rice*, 55 N. Y. 472, 479.

⁵ *Flynn v. Hurd*, 118 N. Y. 19; *People v. Board &c.*, 93 N. Y. 397; *Board &c. v. Thompson*, 106 Ind. 534.

⁶ *Town of Kirkwood v. Newbury*, 122 N. Y. 571; *People &c. v. Board*, 51 N. Y. 401; *People &c. v. Flagg*, 46 N. Y. 401; *People &c. v. Kilman*, 69 N. Y. 32.

⁷ *Huggans v. Riley*, 125 N. Y. 88. See *Berlin Bridge Co. v. Wagner*, 57 Hun. 346.

⁸ *Mathes v. Crawford*, 36 Barb. 564.

boroughs, but as the expense was often too burdensome it was sometimes shifted by statute on the counties; but unless lawful proceedings be taken thus to charge the county this duty still rests upon the local municipality.¹ The Michigan statute authorizing county supervisors to order the construction of a bridge by differing townships, etc., and to fix the respective portions of the cost which each township shall contribute, applies only to town strips in which a portion of the bridge is located.² In New Hampshire to entitle a town, which has rebuilt a bridge to contribution from another town it is not necessary that the latter should have been made a party to any legal proceeding before the bridge was rebuilt.³

§ 1477. Contribution to cost of bridges.—The Vermont statute of 1884 provided for assessing a portion of the cost of maintaining a bridge within a town on adjoining towns benefited thereby, but under the repealing statute of 1886 a town cannot be assessed for a bridge wholly within another town, and any town so assessed may procure the vacation of the assessment.⁴ Where a bridge as jointly built by several towns did not extend to the limit fixed by the county court's order, upon one side of the river, nor to the bank, and the town in which that end was located constructed and maintained at its own expense an arrangement for connecting the end of the bridge with the bank, all of the towns were held liable for an injury caused by the insufficiency of such arrangement;⁵ but if the arrangement between the bridge and the bank had formed a part of the highway, only the town in which such part of the highway was would have been liable for its insufficiency.⁶ In Michigan towns may be compelled to contribute to a bridge, but not a town in which no part of the bridge is situate, whatever particular or local interest it may have in its construction.⁷ Under the Virginia code of 1887, though coun-

¹ *Westfield Borough v. Tioga* Rep. 617; *Tunbridge v. Royalton*, 58 County, 150 Penn. St. 152; *Road in Vt.* 212; *Wardsboro v. Jamaica*, 59 Milton, 40 Penn. St. 300. *Vt.* 514. *Contra*, *Strafford v. Sharon*,

² *Frenchtown Township v. Monroe* 61 Vt. 126.
County, 89 Mich. 204; *Ecorse Town-ship v. Board &c.*, 75 Mich. 270.

³ *Pittsburg v. Clarksville*, 58 N. H. 291.

⁴ *Underhill v. Essex (Vt.)*, 23 Atl.

⁵ *Tyler v. Williston*, 62 Vt. 269.

⁶ *Powers v. Woodstock*, 38 Vt. 44.

⁷ *Frenchtown v. Monroe County*, 89 Mich. 204.

ties are liable to contribute to the expense of maintaining a bridge or causeway between them, yet a county is not liable for any part of the expense of maintaining a causeway wholly in an adjacent county but necessary as an approach to a bridge between the two counties.¹ Towns may by agreement vary their statutory liability to contribute.²

§ 1478. County liability for neglecting to repair bridges. In Indiana the statutory duty to repair bridges renders the county liable for neglect thereof.³ In Missouri and Texas a county is not liable for injury sustained by reason of a defective bridge, unless the liability is imposed by statute expressly or by necessary implication.⁴

§ 1479. General duty to repair bridges.—If a bridge is opened for public travel the whole of it must be kept in a reasonably safe condition for such use,⁵ and travelers have the right to assume that it is safe for use in the ordinary way and with ordinary vehicles and loads.⁶ The Illinois rule is that a municipality ought to close an unsafe bridge if unable to repair it by reason of want of funds.⁷ A municipality may be liable to an individual for so negligently constructing a foot-bridge as to make it appear to form a part of a highway bridge and so lead him to drive a loaded team thereon.⁸ And the rule requires the bridge approaches to be kept equally

¹ Gloucester County v. Middlesex County (Va.), 14 S. E. Rep. 660.

² Stitt v. Castelline, 88 Mich. 239.

³ Park v. Board (Ind.), 30 N. E. Rep. 147. As to the duty of county commissioners to repair their bridges, see Harris v. Board, 121 Ind. 299; Board v. Pearson, 120 Ind. 426; Board v. Arnett, 116 Ind. 438; Board v. Legg, 110 Ind. 479; Board v. Emmerson, 95 Ind. 579.

⁴ Pandeman v. St. Charles County (Mo.), 19 S. W. Rep. 733; Heigel v. Wichita County (Tex.), 19 S. W. Rep. 562.

⁵ A city which opens a bridge for public travel is liable for injuries caused by the defective condition of one side of the bridge, though the

other side is perfectly safe for travel (overruling *Tritz v. City of Kansas*, 84 Mo. 632). *Walker v. City of Kansas*, 99 Mo. 647. See, also, *Bassett v. St. Joseph*, 53 Mo. 290; *Brown v. Glasgow*, 57 Mo. 156; *Craig v. Sedalia*, 68 Mo. 417; *Staples v. Town of Canton*, 69 Mo. 592; *Brennan v. St. Louis*, 92 Mo. 482.

⁶ *Apple v. Marion County*, 127 Ind. 553. See, also, *House v. Board*, 60 Ind. 580; *Indianapolis v. Gaston*, 58 Ind. 224; *Town of Elkhart v. Ritter*, 66 Ind. 136; *Patton v. Board*, 96 Ind. 181; *Vaught v. Board*, 101 Ind. 123; *Board v. Dombke*, 94 Ind. 72.

⁷ *Carney v. Marseilles*, 136 Ill. 401.

⁸ *Fisher v. Cambridge*, 133 N. Y. 527.

safe.¹ The same rule applies to bridges as to other highways in general in respect to notice of their defects to be imputed to the authorities.² A town is not liable where the defect in the bridge was not the proximate cause of the injury.³ Want of funds does not excuse the neglect to repair a bridge where it does not appear that the commissioner made no effort to obtain more after he had expended his bridge funds.⁴

§ 1480. Latent defects — Duty to inspect bridges.— The age of a bridge may suggest probable infirmity and impose the duty of inspection, but a town cannot be charged with knowledge of a latent defect in the absence of anything suggestive of weakness if proper care and inspection are exercised.⁵ The supporting timbers of a bridge should be inspected to discover dry rot or other latent defects.⁶ County commissioners charged with the duty of maintaining bridges must take notice of the tendency of their materials to decay, but a traveler is not so bound, having a right to assume that decayed timbers have been properly repaired.⁷

§ 1481. Rule as to heavy loads on bridges.— It is not negligence *per se* to attempt to cross a bridge with a traction steam-engine and threshers, as bridges have come to be commonly used for such purpose.⁸ It has, however, been held in Indiana that a county is not bound to anticipate uses of a bridge not known at time of construction; is bound to maintain a bridge only for ordinary travel; and that the passage of a traction engine weighing eight thousand six hundred pounds is not an ordinary travel.⁹ The rule in Pennsylvania is that a township is not bound to assume that its bridges

¹ *Bradford v. Armiston*, 92 Ala. 349.

² *Sherman City v. Nairey*, 77 Tex. 291.

³ *McClain v. Garden Grove* (Iowa), 48 N. W. Rep. 1031.

⁴ *Bullock v. Town of Durham*, 19 N. Y. Supl. 635.

⁵ *O'Neil v. Deerfield*, 86 Mich. 610; *Chicago v. Langlass*, 66 Ill. 361.

⁶ In *Blank v. Levonia*, 79 Mich. 1, the court said: — "In respect to latent defects in the timbers of a

bridge, it is the duty of the highway commissioners to make proper and reasonable inspection to ascertain its condition as to safety for the public travel." See, also, *Moore v. Township of Kenockee*, 75 Mich. 332.

⁷ *Apple v. Board*, 127 Ind. 553.

⁸ *Wabash City v. Carver*, 129 Ind. 552; *Board &c. v. Brod* (Ind. App.), 29 N. E. Rep. 430.

⁹ *Board v. Chippes* (Ind.), 29 N. E. Rep. 1066.

will be used in an unusual manner, either by crossing at great speed or by the passing of an unusual weight, and that its liability stops with maintaining its bridges so as to protect against injury by a reasonable and probable use thereof.¹ And the same rule exists in Connecticut and Massachusetts² and in New York.³ In 1834 it was held in Vermont not a sufficient test of a bridge that it would bear the weight of a heavy team, but that in a grazing State like Vermont it should be sufficient to bear a drove of cattle.⁴ A load heavier than allowed by statute will bar a recovery.⁵

§ 1482. Abutting owners' rights and easements.—The State does not own the streets, and its sole power over them is to regulate their use for public purposes.⁶ The consent of the State to erect telegraph poles in highways may protect the telegraph company from indictment for creating a nuisance, but gives it no right to erect such poles against the owners of the fee in the highways, and such owners may be entitled both to damages and removal of the poles where they have not consented to and been compensated for the occupation of the highway by such poles.⁷ And a telegraph company cannot invoke the equity power of courts to prevent the abutting owners from interfering with such poles, though its lines have been erected under legislative sanction.⁸ The interference

¹In *McCormick v. Washington Township*, 112 Penn. 81, 185, it was held that the township was not liable for the breaking of an old bridge while a traction steam-engine, etc., were passing over it. An ordinary highway bridge is not intended for use by steam or street cars. *Monongahela Bridge Co. v. Pittsburgh R. Co.*, 114 Penn. St. 478, 484.

²*Wilson v. Town of Grantz*, 47 Conn. 59, 74; *Gregory v. Adams*, 14 Gray, 242.

³*Clapp v. Town of Ellington*, 51 Hun, 58, as applied where a bridge broke down under a traction engine and tank weighing eight thousand five hundred pounds.

⁴*Richardson v. Royalton &c. Co.*, 6 Vt. 496.

⁵*Dexter v. Canton Toll Bridge Co.*, 79 Me. 563, where the statute prohibition applied "to any loaded cart, wagon or other carriage, the weight whereof exceeds four thousand five hundred pounds, exclusive of the team and carriage." *Held*, that the driver was a part of the load. Compare *Howe v. Castleton*, 25 Vt. 162.

⁶*American Rapid Tel. Co. v. Hess*, 125 N. Y. 641.

⁷*Eels v. American &c. Tel. Co.*, 20 N. Y. Supp. 600; *Blashfield v. Telegraph Co.*, 18 N. Y. Supp. 250; *Dusenbury v. Telegraph Co.*, 11 Abb. N. C. 440.

⁸*Metropolitan Tel. Co. v. Colwell Lead Co.*, 67 How. Pr. 365.

with the easements of an abutting owner in a city street is *pro tanto* a taking of them as property for which he is entitled to be paid.¹ The right of an abutting owner is not, however, so absolute that he can prevent all interference to his detriment with the street on his front;² for example, where the fee is in the city he cannot prevent, and is not entitled to damages for, the laying of horse railroad tracks on the street in front of him, if there is not thereby an exclusive appropriation of the street;³ and the same rule applies to steam railroad tracks.⁴ But the abutting owner is entitled to damages where the railroad tracks and structures amount substantially to an exclusive appropriation of the street;⁵ or where he has a fee in the street;⁶ or where the railroad and its structures are unauthorized and illegal.⁷ A city having power to regulate the use of its streets may provide reasonable regulations for the exercise of a legislative franchise on them, but may not pass an ordinance declaring that such franchise or right shall not be exercised without the consent of the city.⁸

§ 1483. The same subject continued.—Abutting owners on a city street, the fee of which is in the city, have a right of access thereto and other special easements therein, of which they cannot be deprived without compensation by both the State and city combined.⁹ An abutting owner's easement in the street in front to its full width for purposes of access, light and air is property which cannot be taken from him for public use without compensation.¹⁰ An elevated railroad

¹ *Bohm v. Metrop. El. R. Co.*, 129 N. Y. 576; *Kane v. N. Y. El. R. Co.*, 125 N. Y. 164; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1.

² *Reinings v. N. Y. &c. R. Co.*, 128 N. Y. 157, 164.

³ *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-second Street &c. R. Co.*, 50 N. Y. 206.

⁴ *Fobes v. Rome &c. R. Co.*, 121 N. Y. 505.

⁵ *Strong v. N. Y. El. R. Co.*, 90 N. Y. 122; *Mahady v. Bushwick R. Co.*, 91 N. Y. 149; *Washington Cemetery v. Prospect Park R. Co.*, 68 N. Y. 591.

⁶ *Williams v. N. Y. &c. R. Co.*, 16

N. Y. 97; *Craig v. Rochester &c. R. Co.*, 39 N. Y. 404.

⁷ *Hussner v. Brooklyn R. Co.*, 114 N. Y. 433; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; *Lohr v. Metropolitan R. Co.*, 104 N. Y. 268.

⁸ *Allen v. Jersey City*, 53 N. J. Law, 522.

⁹ *Reining v. N. Y. &c. R. Co.*, 128 N. Y. 157; *Kane v. N. Y. El. R. Co.*, 125 N. Y. 164; *Kernochan v. N. Y. El. R. Co.*, 128 N. Y. 559; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132.

¹⁰ *Lamm v. Chicago R. Co.*, 45 Minn. 71; *Adams v. Chicago R. Co.*, 39

structure in a city street is inconsistent with its character as an open public street, and therefore violates the rights of abutting owners though the title to the soil of the street be in the city, and though the structure be erected under the combined authority of State and city.¹ An abutting owner in a populous city who keeps a retail store may have an action to restrain any obstruction which turns the tide of travel from his sidewalk to the opposite sidewalk.² As the sidewalk is constructed for and allotted to the use of pedestrians, its obstruction by trucks cannot be justified on the ground of business necessity, even though the street be so crowded as not to allow the trucks to be backed up to the sidewalk; and the New York common council has power to permit such obstruction only in connection with the erection or repair of buildings.³ The owner of land over which a public way passes has the right to occupy the land above and below its surface to any extent that will not impair its usefulness as a way, for instance, the cornice of his house may extend over the street.⁴

§ 1484. Liability for defective construction.—Cities and towns are not bound to construct highways according to the highest standards of engineering; to do so would often be impracticable for want of funds.⁵ The length of the roads which

Minn. 286; *Kaiser v. St. Paul R. Co.*, 22 Minn. 149; *Rosenthal v. Taylor R. Co.*, 79 Tex. 325.

¹ *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96.

² *Flynn v. Taylor*, 127 N. Y. 596; *Callanan v. Gilman*, 107 N. Y. 360; *Welsh v. Wilson*, 101 N. Y. 254; *People v. Loehfelm*, 103 N. Y. 1; *People v. Horton*, 64 N. Y. 610.

³ *Richardson & Co. v. Barstow*, 26 Abb. N. C. 150.

⁴ *Farnsworth v. Rockland*, 83 Me. 508.

⁵ In an article on "The Betterment of our Highways" in the September number of *The Atlantic Monthly*, Mr. N. S. Shaler thus speaks of some of the difficulties of highway re-

form:—"Above all it will be difficult to persuade our rural people to provide themselves with systems of highways, the cost of which at the outset will be far greater than that of all the existing public improvements in their respective communities. . . . In the rough reckoning of the country engineer, it always seems to be advantageous to construct a road on the most direct alignment which will be passable to loaded vehicles, with all the power which can conveniently be put upon them. It is easy, however, to show that usually the only economy which is thus effected is in the cost of first construction. . . . Moreover, the expense of maintaining hilly roads,

a town is obliged to maintain, the ease or difficulty of such maintenance, the amount of travel, and the amount of assessable property, are all elements to be considered in determining how high a degree of excellence can reasonably be required of a town in the construction or repair of any particular road or piece thereof.¹ Many of the streets of Brooklyn are paved with cobble-stones and are so rough as to pound and shake vehicles into pieces in a short time, the consequence being that the owners of vehicles have alone to pay the tax which ought to be generally distributed among the tax-payers. The duty of paving, however, is *quasi-judicial*, and the city is not liable to individuals for the manner in which it exercises its discretion as to paving.²

§ 1485. Defective highway plan — Liability for.— In some States a city is not liable, in cases in which a street is defective and unsafe by reason of the defective plan of its construction, even where the plan was not expressly adopted before the construction,³ but is liable for a defect caused by an unauthor-

under the wearing action of rain, frost and locked wheels, will more than counterbalance the cost of a longer but less inclined route. . . . Difficult as is the task which the surveyor has to meet in planning a highway, the work is relatively simple as compared with the more detailed part of his duties when he comes to determine the exact form and structure of the road-bed. He must take into account the general nature of the traffic for which the way is to be used, the quality of the underlying earth and the effect of the water upon it, the penetration of frost and its effects, the dangers from the scouring action of rain, and the character of the material to be used in building the traveled way. Simple as the task of road-building may seem to be, it is in fact more complicated than that which is encountered by the railway engineer. . . . A part of the badness of our

American roads is due to the fact that the trackway is far too wide to be effectively maintained. In this art we may well take a lesson from the ancient Romans, perhaps the earliest skilful road-makers in the world. They invariably built their road-beds with no more width than was sufficient to permit two wagons conveniently to pass each other."

¹ Sanders v. Palmer, 154 Mass. 475; Hayes v. Cambridge, 136 Mass. 402; Rooney v. Randolph, 128 Mass. 580.

² Mills v. Brooklyn, 32 N. Y. 489. See, also, § 764, *ante*.

³ Urquhart v. Ogdensburg, 91 N. Y. 67. Where a sidewalk, roadway and gutter are constructed according to grades adopted by the board of trustees, and a crosswalk is laid by the street commissioner to match the rest of the work, without instructions as to its grade, except as implied by the grades of the other portions of the work, negligence is not

ized alteration of the original plan.¹ In Illinois and Wisconsin a city is held to the same liability where an injury results from a defective plan as where it results from negligence in the execution of the plan or in the control and maintenance of the streets after completion;² and this rule of liability has been adopted in Kansas, where it is held that a city has no more right to plan an unsafe condition of its streets than to plan or create a public nuisance.³ In Iowa it is held to be no defense to a city that the defective sidewalk in question was made in the manner customarily adopted by the city.⁴ But whether a sidewalk is properly constructed or not depends

imputable to the village because of failure more definitely to establish the grade of the crosswalk, or by reason of any error in judgment in establishing the grade. *Betts v. Village of Gloversville*, 8 N. Y. Supl. 795.

¹ *Clemence v. Auburn*, 66 N. Y. 334.

² *Chicago v. Langlass*, 66 Ill. 361; *Chicago v. Gallagher*, 44 Ill. 295; *Prideaux v. Mineral Point*, 43 Wis. 513.

³ *Gould v. Topeka City*, 32 Kan. 485; *Topeka v. Sherwood* (Kan.), 18 Pac. Rep. 933. In the *Gould* case just cited the court reviewed the authorities where it had been held that a city was not liable for any mistakes in the exercise of its quasi-judicial powers. "In our opinion a city has no more right to plan or create an unsafe and dangerous condition of one of its public streets than it has to plan and create a public or common nuisance; and it is admitted that it has no right to do this. 2 *Dillon's Munic. Corp.* (3d ed.), § 660. The rule contended for by counsel for the defendant has been applied to various cases, as follows: It has been applied to city improvements and the cities held not liable in cases where the property of individuals

outside of the streets has been flooded and injured on account of the insufficiency of sewers or drains. *City of Atchison v. Challiss*, 9 Kan. 603; *Steinmeyer v. City of St. Louis*, 3 Mo. App. 256; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Darling v. Bangor*, 68 Me. 108; *Child v. City of Boston*, 86 Mass. 41; *Van Pelt v. City of Davenport*, 42 Iowa, 308. The rule has also been applied and a city held not liable in a case where water on adjoining property was polluted by means of a sewer or drain. *Merrifield v. Worcester*, 110 Mass. 216. The rule has also been applied and a city held not liable in a case where, by the digging of a ditch, the rent of a person's house was diminished. *Lambar v. City of St. Louis*, 15 Mo. 610. And also to the same effect where, by the digging of a ditch and the construction of a culvert on the sidewalk, the plaintiff's abutting property was damaged. *White v. Corporation of Yazoo City*, 27 Miss. 357. The rule has also been applied and a city held not liable in a case where a school child was injured by an unsafe staircase. *Hill v. Boston*, 122 Mass. 344."

⁴ *Weber v. Creston City*, 75 Iowa, 16; s. c., 39 N. W. Rep. 126.

upon the necessities of the situation with a presumption in favor of a proper construction.¹

§ 1486. **The same subject continued.**—The fact that a road is so constructed that it is not likely to keep in good condition for a great length of time does not render the town liable unless the danger is so imminent that it can fairly be said to show a want of reasonable care and diligence not to repair it at once.² A municipality may be liable for a visibly defective construction of a street or sidewalk causing formations of ice, though but for such defective construction it would not be liable for such formations.³ In Michigan the rule is that a municipal corporation is not liable for constructing its streets upon a defective plan, and that in carrying them forward to completion it may determine for itself to what extent it will guard the public against possible accidents.⁴ A

¹ *Miller v. St. Paul*, 38 Minn. 134; s. c., 36 N. W. Rep. 271.

² *Stoddard v. Winchester*, 154 Mass. 149. In *Rocheport v. Attleborough*, 154 Mass. 140, the court said:—"Although the culvert was not so well built as to be likely to stand many years without repairs, it could not properly be held that the danger of a subsidence of the road was so imminent as to warrant holding the town chargeable with actionable neglect. It would throw too heavy a burden upon towns for the court, without more explicit legislation looking to that end, to hold them responsible merely because a road is so constructed that a defect therein of this character is likely to occur in the remote future."

³ *Adams v. Chicopee*, 147 Mass. 440, where the court said:—"The question of law involved in the exception was decided in the case of *Pinkham v. Topsfield*, 104 Mass. 78. In that case the jury were instructed that, 'if there were some special cause for the formation of ice in that particular locality, owing to the construction

or condition of the road, it would be a defect, if it rendered the way unsafe and dangerous though it was only smooth and slippery;' and the ruling was unanimously sustained by the court. The doctrine is stated in *Fitzgerald v. Woburn*, 109 Mass. 204, in similar terms; and in the leading case of *Stanton v. Springfield*, 12 Allen, 566, it is said that 'a way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality.' In the decision in *Billings v. Worcester*, 102 Mass. 329, there is nothing in conflict with this doctrine, although some of the reasoning in the opinion seems to lead away from it; but through the change in the law by the enactment of the statute of 1877, chapter 234, that reasoning has become inapplicable to present cases. Pub. Sts., ch. 52, § 18; *Post v. Boston*, 141 Mass. 189; *Blake v. Lowell*, 143 Mass. 296."

⁴ *Alexander v. Big Rapids*, 76 Mich. 282, 292; *Davis v. Jackson*, 61 Mich. 530, 535, 539; *Detroit v. Beekman*, 34 Mich. 125; *Lansing v. Toolan*, 37

municipal corporation is not liable to individuals for constructing an insufficient sewer,¹ or for so grading streets as to cause an overflow of water on adjoining lands.²

§ 1487. Duty to keep streets reasonably safe.—As municipal corporations are not insurers of those who use the streets, their duty is discharged by making the streets reasonably safe;³ or, as the rule is expressed in New York, the duty of a city to keep its streets in a safe condition for travel is absolute, but it is only bound to exercise reasonable diligence and care in the performance of that duty.⁴ Whether this duty is performed or not in a particular case is a question of fact for the jury.⁵ The care required is to be measured by the circumstances, and must naturally be greater in a populous city than through a sparsely settled town.⁶ In determining what is reasonable care the jury will consider the manifest danger and probability of an accident.⁷ The degree of care devoted to a highway should correspond to the degree of danger which may reasonably be anticipated from the knowledge of known defects, and when the danger is great the authorities must either warn the public of it or close the highway.⁸

Mich. 152; s. c., 38 Mich. 315; *McCutcheon v. Horner*, 43 Mich. 483; *McKellar v. Detroit*, 57 Mich. 158; *Shippy v. Au Sable*, 65 Mich. 494; s. c., 32 N. W. Rep. 741.

¹ *Mills v. Brooklyn*, 32 N. Y. 489.

² *Wilson v. New York*, 1 Denio, 595. See, also, *Cole v. Medina*, 27 Barb. 218; *Cavanagh v. Brooklyn*, 38 Barb. 232.

³ *Vicksburg v. Hennessy*, 54 Miss. 396; *Jackson Township v. Wagner*, 127 Penn. St. 184.

⁴ *Turner v. Newburgh*, 109 N. Y. 301.

⁵ *Bullock v. New York*, 99 N. Y. 654; *Saulsbury v. Ithaca*, 94 N. Y. 27; *Weed v. Ballston Spa*, 76 N. Y. 329; *Nevin v. Rochester*, 76 N. Y. 619; *Evans v. Utica*, 69 N. Y. 166; *Clemence v. Auburn*, 66 N. Y. 334; *Todd v. Troy*, 61 N. Y. 506; *Diveny v. Elmira*, 51 N. Y. 512; *Dewire v. Bailey*, 131 Mass. 169.

⁶ *Glazier v. Town of Hebron*, 131 N. Y. 447. In *Monongahela City v. Fischer*, 111 Penn. St. 9, Paxson, J., said:—"In the closely built up portions of a town or city the duty of the authorities to keep the entire street and sidewalks in a safe condition may be conceded. All portions of it are being constantly used by day and by night. But this has never been held to be the rule as regards country roads. They are seldom, if ever, kept in repair from side to side. A sufficient portion of the middle only is kept in smooth condition, and safe and convenient for travel." See, also, *Perkins v. Fayette*, 68 Me. 152; *Blake v. Newfield*, 68 Me. 365; *Commonwealth v. King*, 13 Met. 115; *Keyes v. Marcellus Village*, 50 Mich. 439.

⁷ *Hubbell v. Yonkers*, 104 N. Y. 434.

⁸ *Wiltse v. Tilden*, 77 Wis. 152. In

§ 1488. Highway duty of New York towns and villages.—The duty of towns in New York in respect to the care and regulation of highways has already been generally considered in the chapter on Torts.”¹ Such liability, under the act of 1881, applies as well to an obstruction at the side of the highway as to a disturbance of or defects in the bed of the highway,² and is governed by the general rule that dangerous places in a highway or at its side should be protected by fenders, guards or barriers.³ In order to hold the town to its liability it must be alleged in the complaint that the town could obtain the requisite funds.⁴ The duty of the highway commissioners is not only to give orders to the overseers in respect to highway repairs, but one of personal vigilance to see that such orders are obeyed, and for neglect of this duty the town is liable;⁵ for the overseers are subordinate officers acting under the supervision of the commissioners.⁶ Under the act of 1854 villages became liable for the neglect of village streets by village trustees in the same manner as towns for the neglect of their highway commissioners.⁷

§ 1489. Excuse of want of funds.—Want of funds and of power to raise funds or enforce contributions of labor relieves a municipal corporation from liability for injuries caused by defective streets, but the burden of showing such want of

this case the highway was overflowed by the rise of a creek, and a charge to the jury that if the dangerous condition of the road at the time of the accident might reasonably have been anticipated by the town authorities in view of the previous known defects therein and the nature of the creek, it was their duty to have closed up the road until repaired or to have warned travelers of the danger, was held to be correct.

¹ § 737, *ante*.

² *Whitney v. Ticonderoga*, 127 N. Y. 40, where there was a recovery against the town for an injury caused by the negligence of the highway commissioners in leaving a road scrapper at the side of a narrow road.

³ *Fay v. Town of Lindley*, 11 N. Y. Supl. 355; *Maxim v. Town of Champion*, 4 N. Y. Supl. 515; *Ivory v. Town of Deer Park*, 116 N. Y. 476; *Ashberry v. Town of West Seneca*, 11 N. Y. Supl. 306.

⁴ *Eveleigh v. Hannsfield*, 34 Hun, 140.

⁵ *Farman v. Town of Ellington*, 46 Hun, 40. See *Bidwell v. Town of Murray*, 40 Hun, 190.

⁶ *Bartlett v. Crozier*, 17 Johns. 439; *Smith v. Wright*, 27 Barb. 621.

⁷ *McSherry v. Canandaigua Village*, 129 N. Y. 612; *Saulsbury v. Ithaca Village*, 94 N. Y. 27; *Conrad v. Ithaca Village*, 16 N. Y. 158.

funds or of power to raise them is upon the corporation;¹ and the corporation is not relieved where it has power under its charter to call upon the inhabitants to repair,² or where the charter gives ample powers of taxation for such repairs,³ or where the cost of repairing a defective sidewalk can be charged on the adjoining property.⁴ And the mere fact that money collected for street improvements was expended by the city on some of its streets, leaving others unimproved, and nothing on hand for that purpose, is not sufficient to free it from liability for injuries caused by one of these defective streets.⁵ The amount of money raised by a town for highway repairs during the year of an accident, and the amount actually expended, may properly be considered upon the question whether the town did what was reasonable in the repair of the highway where a person has been injured.⁶ The fact that a village has no funds to repair a bridge does not relieve it from liability, as it might close it if unsafe.⁷ It may be necessary by force of statute to allege in the complaint that the town or municipality could have obtained the necessary funds.⁸

§ 1490. Primary municipal duty — Abutting owners' liability.—The general rule is that the primary duty to keep highways and streets in repair rests upon the municipal corporations within whose limits they are, this duty being im-

¹ *Weed v. Ballston Spa Village*, 76 N. Y. 329; *Hines v. Lockport City*, 50 N. Y. 236; *Adsit v. Brady*, 4 Hill, 630; *Erie City v. Schwingle*, 22 Penn. St. 384.

² *Weed v. Ballston Spa*, 76 N. Y. 329.

³ *Whitfield v. Meridian City*, 66 Miss. 570; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459.

⁴ In an action against a municipal corporation to charge it with liability to one injured by a defective sidewalk, the cost of repairing which could have been charged upon the adjoining property, it is no defense to show that the corporate funds had been exhausted in other repairs; and

to reject evidence tending to establish that fact is not error. *Incorporated Village of Shelby v. Clagett* (Ohio), 22 N. E. Rep. 407.

⁵ *Whitfield v. City of Meridian*, 66 Miss. 570; s. c., 6 So. Rep. 244.

⁶ *Sanders v. Palmer*, 154 Mass. 475.

⁷ *Carney v. Marseilles*, 136 Ill. 401; *Marseilles v. Howland*, 124 Ill. 547.

⁸ Under New York Laws of 1881, chapter 700, a town can be held liable for injuries sustained from a defective highway or bridge, only when it appears that funds for repairs could have been obtained, and this must be alleged in the complaint. *Eveleigh v. Hounsfield*, 34 Hun (N. Y.), 140.

plied in the acceptance of a charter from the State.¹ Such duty is not discharged by the fact that a duty is also imposed upon abutting owners to keep the highway in repair in front of their land.² Lot-owners' obligation to repair streets or sidewalks does not exist at common law, but is statutory or arises from contract.³ It seems well settled that the neglect of an abutting owner to keep the sidewalk in repair and to keep it free from snow and ice, as required by a city ordinance, does not render him liable to a party injured or the city itself, unless such owner himself caused the defect.⁴ If a city lot-owner neglects to repair his sidewalk as required by the city charter, the city may have such repair done and recover the expense from him, but that is the extent of his liability.⁵

§ 1491. Municipal and abutting owners — Statutory liability.— In some jurisdictions abutting owners are made pri-

¹ *Rochester v. Campbell*, 123 N. Y. 405; *Saulsbury v. Ithaca*, 94 N. Y. 27; *Conrad v. Ithaca*, 16 N. Y. 158.

² *Rochester v. Campbell*, 123 N. Y. 405; *Russell v. Canastota*, 98 N. Y. 496; *Saulsbury v. Ithaca*, 94 N. Y. 27; *Robbins v. Chicago*, 4 Wall. 657; *Gridley v. Bloomington*, 88 Ill. 554; *State v. Gorham*, 37 Me. 457. In *Smally v. Appleton*, 75 Wis. 18, it was held that, though the street commissioner had ordered the abutting owner to repair the defect, the city was not thereby exempted unless the defect was actually repaired. A city is liable for injuries resulting from a depression in a sidewalk caused by operations of the abutting owner, if it have actual or constructive notice of the defect, though said owner be also liable. *Philadelphia v. Smith* (Pa.), 16 Atl. Rep. 493; s. c., 23 W. N. C. 242.

³ *Fulton Village v. Tucker*, 3 Hun, 529. See, also, *Moore v. Gadsden*, 93 N. Y. 12; *Wenzlick v. McCotter*, 87 N. Y. 127.

⁴ *Rochester v. Campbell*, 123 N. Y. 405, 420; *Moore v. Gadsden*, 93 N. Y.

12; *St. Louis v. Conn. L. Ins. Co.*, 107 Mo. 92. In *Kurtz v. Boylston Market Assoc'n*, 14 Gray, 252, the court thus expressed the rule:—"The defendants as owners and occupants of the land abutting on Boylston street are not responsible to individuals for injuries resulting to them from defects and want of repair in the sidewalks, or by means of snow and ice accumulated thereon by natural causes, though by city ordinance it is made the duty of abutters under prescribed penalties to keep the sidewalks in good repair and reasonably to remove all snow and ice therefrom." See, also, *Knuffle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Hill v. Fond du Lac*, 56 Wis. 242; *Weller v. McCormick*, 47 N. J. L. 397; *Flynn v. Canton Company*, 40 Md. 312; *Heeney v. Sprague*, 11 R. I. 456; *Hartford v. Talcott*, 48 Conn. 525; *Eustace v. Johns*, 38 Cal. 3; *Jansen v. Atchison*, 16 Kan. 358; *Keokuk v. Keokuk District*, 53 Iowa, 352; *Taylor v. Lake Shore R. Co.*, 45 Mich. 74.

⁵ *Rochester v. Campbell*, 123 N. Y. 405, 415.

marily liable by statute or charter for injuries received on adjoining sidewalks, and in such cases the person injured must first exhaust his legal remedies against the abutting owners.¹ Where it is made the primary duty of a lot-owner to repair the sidewalk, and in case of his default it is the duty of the city to do so, and both neglect their duty, they are not joint tort-feasors;² and therefore the rule that one wrong-doer cannot recover against the other for injuries caused by their

¹ In an action against the city of Sheboygan for injuries caused by an obstruction in the street, defendant answered, by way of abatement, that the obstruction was placed in the street by the owner of the abutting property. Held that, under the provisions of the city charter (Laws Wis. 1874, ch. 266, § 24), before plaintiff can recover he must exhaust his legal remedies against the person who placed the obstruction in the street. *Raymond v. City of Sheboygan*, 70 Wis. 318; s. c., 35 N. W. Rep. 540, where Cole, C. J., said:—"A similar provision is found in a number of the city charters of this State, and this court has had occasion to consider its effect. Its validity has been affirmed, and it has been held that it was intended to relieve the city, so far as possible with justice to the injured party, from liability for injuries occasioned by obstructions lawfully placed in its streets by persons for whose acts it was not directly responsible, and that whenever the injured person can, by the use of remedies furnished by law, recover his damages of the party primarily liable, he must do so before resorting to his remedy against the city. *McFarlane v. Milwaukee*, 51 Wis. 691. The same doctrine as to the city's responsibility in such a case is recognized in *Hineks v. Milwaukee*, 46 Wis. 559; *Amos v. Fond du Lac*, 46 Wis. 695; *Papworth v. Milwaukee*, 64 Wis. 390." Under the

charter of Fond du Lac, section 206, providing that owners shall be primarily liable for injuries from defective sidewalks in front of their premises, and the city shall not be liable until plaintiff has exhausted his remedy against the owner, on proof that the sidewalk which caused the accident was before private property, and was constructed by the owner, plaintiff must show that he has exhausted his remedy against such owner. *Hiner v. Fond du Lac*, 71 Wis. 74; s. c., 36 N. W. Rep. 622; *Henker v. Fond du Lac*, 71 Wis. 616; s. c., 38 N. W. Rep. 187. *Contra*, *Noonan v. Stillwater*, 33 Minn. 198.

² Under the charter of Detroit (Local Acts Mich. 1883, p. 614), which authorizes the common council to provide by ordinance that, whenever any sidewalk requires to be built or repaired, the owner, agent or occupant of the adjacent lot shall be notified to build or repair the same, and declares that, if he neglect to do so for a time to be specified in such ordinance, the board of public works shall build or repair it, the expense to be assessed on such lot, the duty of the lot-owner to repair the sidewalk, when required to do so by ordinance and notice, does not cease on expiration of the time specified in the ordinance; and when both he and the board of public works neglect to repair, and the city has to pay damages for injury caused by the sidewalk's defective condition after

joint offense does not apply as against a city which has paid damages caused by the negligence of an abutting owner.¹ Where a city charter requires the individual offender to be joined as defendant with the city, the verdict may be against both, or against one and in favor of the other,² unless it is prescribed by statute that the city shall not be liable unless judgment is also rendered against the individual whose negligence caused the injury.³

§ 1492. Limited liability for acts, etc., of independent contractor.—A city is not relieved from its duty and responsibility in respect to the safe condition of its streets by employing a contractor to do the work or repairs required to be done, though it has not yet accepted the work from him.⁴

such time had expired, the lot-owner is liable to the city therefor. *Detroit v. Chaffee*, 70 Mich. 80; s. c., 37 N. W. Rep. 882.

¹The city and the person whose negligence caused the injury are not *in pari delicto*; and where the negligence of the city is constructive, the rule that one wrong-doer cannot recover damages against the other for injuries caused by their joint offense does not apply. *City of New York v. Dimick*, 2 N. Y. Supl. 46. See, also, *Lowell v. Railroad Co.*, 23 Pick. 24.

²The charter of Austin, Minn., provides that no action shall be maintained against the city for damages caused by any obstruction or excavation in a street, placed there by any person, or by his negligence in the management thereof, or his failure to maintain guards or lights thereat, unless such person be joined as a defendant; and, in case of judgment against defendants, execution shall first issue against such persons; and, if the city pay the judgment, it shall own and may enforce it against the other defendant. Held, that the verdict may be against both defendants, or against one and in favor of

the other. *Clark v. City of Austin*, 38 Minn. 487; s. c., 38 N. W. Rep. 615.

³The charter of St. Louis (2 R. S. Mo., p. 1626) provides that whenever the city shall be made liable to an action for damages by reason of the negligence of any person, and such person shall also be liable to an action on the same account by the injured party, the latter, on bringing action for such injury, shall join such other person or corporation as defendant, and no judgment shall be rendered against the city unless judgment is rendered against such other person or corporation. Held, where plaintiff was injured by falling on a sidewalk at a place where ice and snow had been allowed to accumulate, that it was not necessary to join as a party defendant with the city a corporation in front of whose premises such snow and ice had accumulated, although there was an ordinance requiring all persons to keep the sidewalks in front of their premises free of such accumulations. *Norton v. St. Louis*, 97 Mo. 537.

⁴*Jefferson Village v. Chapman*, 127 Ill. 438. A municipal corporation; on which its charter imposes the duty of keeping its streets in a safe condi-

Nor is a city relieved from such duty by the fact that an auxiliary duty is imposed on an independent body like the police.¹ A municipal corporation is not liable for the acts or negligence of an independent contractor while engaged in the performance of his contract if the highway defects did not cause the injury,² under the operation of the rule that a person is not responsible for the negligence of a contractor with him who is exercising an independent employment.³

tion for travel, is liable for injuries caused by neglect to place proper lights and guards at night around an excavation which it authorized to be made in the street, though it may have stipulated for such precautions on the part of the contractor who made the excavation. *McAllister v. City of Albany*, 18 Ore. 426; s. c., 23 Pac. Rep. 845. In *Turner v. Newburgh*, 109 N. Y. 301, Gray, J., said that "The city cannot claim legal exemption from liability by reason of its having contracted out the construction of this sewer, and because it had not yet accepted the work of the contractor. The streets remained as much as ever in the care and under the supervision of its officials." A city having caused an excavation to be made is bound to see that it is carefully guarded, and is not absolved from that duty by having employed a contractor to make the excavation. *Brusso v. Buffalo*, 90 N. Y. 679; *Storrs v. Utica*, 17 N. Y. 104; *Robbins v. Chicago*, 4 Wall. 657, 679; *Water Company v. Ware*, 16 Wall. 566; *Logansport v. Dick*, 70 Ind. 65; *St. Paul v. Leitz*, 3 Minn. 297.

¹*Kunz v. Troy*, 104 N. Y. 344, where Andrews, J., said:—"It is sufficient for the purpose of this case to say that the powers conferred and duties enjoined upon the police by the act of 1870, in respect to the streets, are auxiliary only, and not exclusive." See, also, *Todd v. Troy*,

61 N. Y. 506; *Conrad v. Ithaca*, 16 N. Y. 158.

²*Herrington v. Lansingburgh*, 110 N. Y. 145, where the court said:—"At the place where the horses were fastened the street was in perfect condition, and the horses did not become restless or frightened from anything existing in the street, and the accident was in no way caused by any improper condition of the street, but simply by noise resulting from the blast. . . . If there was any carelessness which caused the injury it was that of the contractors. They could choose their own time for firing the blasts, and select their own agents. They could make the charges of powder large or small, and smother the blasts, etc., or they could carelessly omit all precautions, and for the consequence of their negligence they alone would be responsible. If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given the notice; *but the duty to give it did not devolve on the village.*" See, also, *Pack v. Mayor &c.*, 8 N. Y. 232; *Kelly v. Mayor &c.*, 11 N. Y. 432; *McCafferty v. Spuyten Duyvil R. Co.*, 61 N. Y. 178; *Devlin v. Smith*, 89 N. Y. 470; *Wood v. Watertown*, 58 Hun, 298.

³*Town of Pierrepont v. Loveless*, 72 N. Y. 211; *Hexamer v. Webb*, 101 N. Y. 377, 383.

§ 1493. Municipal duty of supervision over others.—A city is liable not only for its own neglect of its streets, but also for that of a person acting under its orders though not a municipal officer,¹ because of its duty of supervision in such cases² or because acting under its permit.³ And in such cases a city is liable without notice of the defect, for ignorance of the defect is itself proof of the omission of the duty of supervision.⁴

§ 1494. General municipal liability for neglect of streets. The general rule is that under the powers usually conferred upon municipal corporations in respect to streets within their limits, it is their duty to keep them in a reasonably safe condition for use by travelers in the usual modes, and that they are liable in damages for injuries resulting from neglect of such duty;⁵ and this rule extends not only to the road-bed but also to the structures over it.⁶ If a city has notice of an unlawful incumbrance on a street, for instance a pile of bricks

¹ *Boucher v. New Haven*, 40 Conn. 456.

² *Manchester v. Hartford*, 30 Conn. 118. See, also, *Forman v. Town of Ellington*, 46 Hun, 40; *Bidwell v. Town of Murray*, 40 Hun, 190; *Bartlett v. Crozier*, 17 Johns. 439; *Smith v. Wright*, 27 Barb. 621.

³ *Cleveland v. King*, 132 U. S. 295, where it was held that a permit authorizing the occupation of part of a public street as a depository for building materials, and requiring proper lights at night to indicate their locality, does not relieve the city from the duty of exercising a reasonable diligence to prevent the holders of the permit from occupying the street in such a way as to endanger others in their proper use of it.

⁴ *Boucher v. New Haven*, 40 Conn. 456. A street commissioner is elected by the people, and apparently not subject to removal by the council, and has the care of streets and sidewalks, and is to keep them free from obstructions and defects, and superintend

construction and repair. It was held that the street commissioner is simply a subordinate agent, charged with specific duties, and that the corporation was not relieved from liability for injuries from defects in the streets and sidewalks occurring through negligence, especially as the city's liability for such injuries is expressly recognized in the requirement of the charter that written notice of the injury be given to the mayor or council. *City of Denver v. Williams*, 12 Colo. 475; s. c., 21 Pac. Rep. 617.

⁵ *Ehrgott v. New York*, 96 N. Y. 264; *Hume v. New York*, 74 N. Y. 264; *Requa v. Rochester*, 45 N. Y. 129; *Davenport v. Ruckman*, 37 N. Y. 568; *Conrad v. Ithaca*, 16 N. Y. 158; *Hutson v. New York*, 9 N. Y. 163; *New York v. Funze*, 3 Hill, 612; *Barnes v. District of Columbia*, 91 U. S. 540.

⁶ *Hume v. New York*, 74 N. Y. 264; *Pedrick v. Bailey*, 12 Gray, 161; *Drake v. Lowell*, 13 Met. 292; *Day v. Milford*, 5 Allen, 28. See, also, *Beach on Contributory Negligence* (2d ed.), § 276,

higher than the legal limit, it is liable for its neglect to remove it if in fact dangerous,¹ though it has not by actual inspection ascertained its dangerous character.²

§ 1495. Municipal liability in Michigan.—The general rule as to municipal liability for the condition of streets did not exist formerly in Michigan, but was partly introduced by statute in 1879 and 1885. At one time there was a conflict in that State between the State and federal courts,³ which was terminated in 1889 by the decision of the federal Supreme Court that the State decisions as to municipal liability for highway defects were binding upon the federal courts within the State.⁴ Again in January, 1887, it was decided by the Supreme Court of Michigan that the act of 1885 making municipal corporations liable for defective sidewalks was unconstitutional;⁵ but in June, 1887, a comprehensive statute went into effect introducing into Michigan the general rule of municipal liability for highway defects;⁶ but such statute

¹ *Rehberg v. New York*, 91 N. Y. 137.

² *Norristown v. Moyer*, 67 Penn. St. 355; *Donaldson v. Boston*, 82 Mass. 508.

³ *Detroit v. Blackeby*, 21 Mich. 84. *Osborne v. Detroit*, 32 Fed. Rep. 36, where Brown, J., said:—"In *Detroit v. Blackeby*, 21 Mich. 84, it was held by a divided court that, in the absence of a statute to that effect, the cities of this State were not liable for damages received on defective sidewalks, and that remained the law of the State until 1879, when the first act was passed. The federal courts, however, had felt themselves bound by precedents of the Supreme Court and had established a different rule, the cause given of which was that aliens and non-residents were permitted to recover for such injuries when citizens of the State could not do so. In 1879 an act was passed making all townships, villages and cities liable to persons sustaining bodily injury upon any of the public

highways or streets by reason of neglect to keep such highways and streets and all bridges, crosswalks and culverts on the same in good repair. In the case of *Detroit v. Putnam*, 45 Mich. 263, it was held that the act of 1879 did not allow damages for injuries sustained by defective sidewalks. In 1885 an act was passed to amend that of 1879, in which the word 'sidewalks' was inserted with the words 'highway, street, bridges, crosswalks and culvert,' and providing that 'the common-law liability of townships, villages and cities in this State for such injuries is hereby abrogated.'"

⁴ *Detroit v. Osborne*, 135 U. S. 492.

⁵ *Church v. Detroit*, 64 Mich. 571.

⁶ Laws of 1887, number 264, of which sections 1 and 2 declare that any township, city or village neglecting to keep its highways, streets, bridges, sidewalks, crosswalks and culverts in reasonable repair shall be liable in damages for injury thereby caused to any person or to any ani-

does not make the municipality liable where the highway defect was not the primary cause of the injury.¹ It has been held that the statute of 1887 creating liability for injuries caused by defective sidewalks does not require that such walks should be wholly within the line of the street if the municipality has actually assumed control of it.² The right of action under the statute of 1887 for injuries sustained from defective highways survives in case of death to the administrator.³

§ 1496. The same subject continued — The rule in other States.—A city charged by its charter with the duty of keeping its streets safe is liable for neglecting to do so.⁴ In Ohio a person injured in consequence of municipal neglect to keep the streets in order has a common-law right of action for damages.⁵ There is a conditional statutory liability in Oregon, and the general rule exists in Colorado.⁶ The District of Columbia is liable for the neglect of its streets in the city of Washington.⁷

mal or vehicle or other property; and section 3 of the same statute enacts that "It is hereby made the duty of townships, villages, cities or corporations to keep in reasonable repair, so that they shall be reasonably safe and convenient for public travel, all public highways, streets, bridges, sidewalks, crosswalks and culverts that are within their jurisdiction and under their care and control and open for public travel." It is held that this statute does not apply to a public alley. *Face v. Ionia City*, 90 Mich. 104.

¹ *Beall v. Athens*, 81 Mich. 536.

² *O'Neil v. West Branch*, 81 Mich. 544.

³ *Racho v. Detroit*, 90 Mich. 92.

⁴ Under its charter it is the duty of the city of Richmond, Virginia, to keep its sidewalks in safe condition, and it is liable to a person injured by reason of its neglect so to do. *Gordon v. City of Richmond*, 83 Va. 436; s. c., 2 S. E. Rep. 727.

⁵ *Cleveland v. King*, 132 U. S. 295.

⁶ Under the Oregon statute providing that an action may be maintained against public corporations "for an injury to the rights of the plaintiff arising from some act or omission" of such corporations, a city is liable for an injury caused by the neglect of its officers to repair streets which it is their duty to maintain, unless the charter expressly exempts the city from liability. *Sheridan v. City of Salem (Ore.)*, 12 Pac. Rep. 925. Cities and towns incorporated under the general law of Colorado (*Gen. St. Colo.*, ch. 109, p. 598) have exclusive control of their streets, and are liable for damages caused by a failure to repair whether such liability is specifically imposed by the act or not. *City of Boulder v. Niles*, 9 Colo. 415; s. c., 12 Pac. Rep. 632.

⁷ *District of Columbia v. Woodbury*, 136 U. S. 450.

§ 1497. **Exceptions to the general rule.**—The Arkansas rule is that municipal corporations are under a duty to keep their streets in repair, but not liable to individuals for neglect to do so unless made so by statute.¹ The prevalence of a rule in some other States similar to that of Arkansas has been before considered in the chapter on "Torts."² In Massachusetts, and generally in New England, a city, like a town, is not liable to an action for a defect in a highway unless such right of action is given by statute;³ and this is the rule in New Jersey and California and a few other States.⁴

§ 1498. **Duty of keeping streets safe to whom due.**—In the State of New York the municipal duty of keeping the streets reasonably safe and convenient exists towards all who are lawfully in the streets; for example, toward one lawfully at work on the street,⁵ and toward children at play on the street.⁶ Under some of the New England statutes this duty extends only to travelers, and not to children at play on the street,⁷ or to mere loungers on the street.⁸ But in mitigation of the harsh statutory rule it is held that a momentary stopping does not deprive a traveler of his rights as such,⁹ even where he leaves his carriage and picks berries at the roadside.¹⁰ And a child on the street does not cease to be a trav-

¹ *Arkadelphia v. Windham*, 49 Ark. 139.

² § 757, *ante*.

³ *Hill v. Boston*, 122 Mass. 344; *Oliver v. Worcester*, 102 Mass. 489; *Hixon v. Lowell*, 18 Gray, 59, 64; *Harwood v. Lowell*, 4 Cush. 310; *Brady v. Lowell*, 3 Cush. 124; *Morgan v. Hallowell*, 57 Me. 375; *Jones v. New Haven*, 34 Conn. 1-13; *Harrison v. New Haven*, 37 Conn. 475.

⁴ *Pray v. Jersey City*, 32 N. J. Law, 394; *Winbigler v. Los Angeles*, 45 Cal. 36. See, also, § 757, *ante*.

⁵ *Rehberg v. New York*, 91 N. Y. 137.

⁶ *McGuire v. Spence*, 91 N. Y. 303; *McGary v. Loomis*, 63 N. Y. 108.

⁷ *Tighe v. Lowell*, 119 Mass. 472; *Blodgett v. Boston*, 8 Allen, 237; *McCarthy v. Portland*, 67 Me. 167; *Stinson v. Gardiner*, 42 Me. 248; *Lyons*

v. Brookline, 119 Mass. 491. See, also, *Beach on Contributory Negligence* (2d ed.), §§ 278, 279.

⁸ *Stickney v. Salem*, 3 Allen, 374.

⁹ *Bourget v. Cambridge* (1892), 31 N. E. Rep. 390; *Bliss v. South Hadley*, 145 Mass. 91; *Varney v. Manchester*, 58 N. H. 430; *Duffy v. Dubuque*, 63 Iowa, 171; s. c., 18 N. W. Rep. 900.

¹⁰ *Britton v. Cummington*, 107 Mass. 347. Whether a person traveling along a highway who undertakes to throw aside a telephone wire hanging so as to endanger travelers, and is injured by the electricity with which it is charged, is guilty of contributory negligence and is not entitled to the damages recoverable under Public Statutes, chapter 52, section 18, for injuries received through a defect in a highway, is a question for the jury. *Bourget v. Cambridge* (Mass., 1892),

eler when he steps aside for an instant to clasp in play a post in the highway, or to look at toys in a shop window.¹ In Wisconsin, where the liability for defective sidewalks is statutory, and confined to travelers, it is held that a child injured while rolling his hoop on a defective sidewalk may recover because traveling and playing at the same time.² In Illinois a person passing over a sidewalk is deemed a traveler thereon, whether his object is business or pleasure or merely to gratify an idle curiosity.³ Trespassers on highways are not entitled to the same protection as others.⁴

§ 1499. Liability for ways which public is invited to use.

Where a municipality so acts in respect to a walk or way as to hold it out as a public thoroughfare it is liable for its defects and unsafe condition,⁵ and is estopped from claiming

31 N. E. Rep. 390. Holmes, J., said:—"It seems to us that to throw on one side, out of the way of travel, a light movable object which is an annoyance or a nuisance where it is, is one of those every-day acts of kindly feeling which fairly may be said to be an incident of travel as it commonly goes on and to be within the protection of the law." It was held to be immaterial that the wire belonged to plaintiff's master. *Burt v. Boston*, 122 Mass. 223; *Hill v. Winsor*, 118 Mass. 251.

¹ *Galline v. Lowell*, 144 Mass. 491; *Hunt v. Salem*, 121 Mass. 294.

² *Reed v. Madison* (Oct., 1892), 53 N. W. Rep. 547. See *Strong v. Stevens Point*, 62 Wis. 255.

³ *Chicago v. Keefe*, 114 Ill. 222.

⁴ A child who, while walking along the top of a private coping adjoining a city sidewalk, fell therefrom into an excavation made by the city, is a trespasser, and cannot recover from the city for injuries sustained. *Clark v. City of Richmond*, 83 Va. 355; s. c., 5 S. E. Rep. 369. Plaintiff's evidence showed that her son, seven years old, was climbing up and sliding down the

post of an awning erected over the sidewalk, and fell into the gutter, some barrels standing on the sidewalk being overturned in his fall, and striking him on the chest, causing his death. It was held that as the deceased had no right to be where he was at the time of the accident, and as the awning was a lawful structure, the city was not liable. *Gaughan v. Philadelphia*, 119 Penn. St. 503; s. c., 13 Atl. Rep. 300; *Oil City Bridge v. Jackson*, 114 Penn. St. 321.

⁵ *Mansfield Village v. Moore*, 124 Ill. 133, where the court said:—"They invited the public to use it as belonging to the village. Having assumed to perform the same duty in regard to it as though it was a part of one of the streets, they were bound to use the same degree of vigilance as they exercised in reference to other sidewalks within the limits of the corporation." See, also, *Gridley v. Bloomington*, 68 Ill. 47; *Champaign City v. Patterson*, 50 Ill. 61; *Bloomington v. Bay*, 42 Ill. 503; *Joliet v. Verby*, 35 Ill. 58; *Codner v. Bradford*, 10 Wis. 443; *Reinhard v. Mayor*, 2 Daly, 243. Plaintiff must

that the land has not been legally laid out as a highway;¹ and in such a case it is not very material whether or not a street has become such by formal acceptance and user by the public.² The case is different where the highway was made under a statute which was unconstitutional and conferred no authority and created no duty.³ A city is not liable for the defective condition of a sidewalk or way outside of the street which it did not build and does not control;⁴ but there is an exception to this rule when the boundary line of the street is not visible so as to inform persons when they are on or off the street.⁵

§ 1500. Not liable for whole width of rural highways.—

In Wisconsin a municipality is not bound to open and keep in repair the whole width of a highway; if it grades and constructs a traveled track of sufficient width and keeps it safe, it is not liable for defects outside of that track into which a

allege and prove that the sidewalk on which the injury occurred was, at the time and place of the injury, controlled and treated by the authorities as a public sidewalk, and opened as such. *Chapman v. Town of Milton*, 31 West Va. 384; s. c., 7 S. E. Rep. 22; *Shannon v. Town of Tama City*, 74 Iowa, 22; s. c., 36 N. W. Rep. 773.

¹ *Sewell v. Cohoes*, 75 N. Y. 45; *Mayor v. Sheffield*, 4 Wall. 189; *Houfe v. Town of Fulton*, 34 Wis. 603; *Stark v. Lancaster*, 57 N. H. 88; *Aurora City v. Colshire*, 55 Ind. 484. In *O'Neil v. West Branch*, 81 Mich. 544, the village caused a sidewalk to be built and assumed control of it, and it was held to be its duty to keep it in repair whether it was wholly within the line of the street or not.

² *Phelps v. Mankato City*, 23 Minn. 276. Where an hotel is set back six feet and nine inches from the line of the lot, and the sidewalk extended from the hotel ten feet and ten inches into the street, that portion on the lot being constructed or paid for by the proprietor of the hotel, the

whole being open to the public to pass and repass at pleasure, it will be deemed a part of the street of the city. *Reese, C. J.*, dissents. *Foxworthy v. City of Hastings*, 25 Neb. 133; s. c., 41 N. W. Rep. 132.

³ *Mayor v. Cunliff*, 2 N. Y. 165.

⁴ *Jewhurst v. Syracuse*, 108 N. Y. 303; *Carpenter v. Cohoes*, 81 N. Y. 21; *Veeder v. Little Falls*, 100 N. Y. 343.

⁵ *Jewhurst v. Syracuse*, 108 N. Y. 303; *Cogswell v. Lexington*, 4 Cush. 307; *Hayden v. Attleborough*, 7 Gray, 338; *Alger v. Lowell*, 3 Allen, 405. Where a city deposits, and permits others to deposit, refuse material in a river, close to and adjoining the end of a graded public street, so that the deposit appears to be a prolongation and part of the street, and the same is dangerous to any one stepping thereon, the city may be guilty of such negligence as to render it liable to any one injured by stepping on the deposit. *Ray v. City of St. Paul*, 40 Minn. 458; s. c., 42 N. W. Rep. 297.

traveler strays without necessity.¹ The same rule exists in Vermont and Missouri,² and in most of the other States as to rural highways.³ If the road margins have been worked into a road and used as such, they also must be kept reasonably safe for travel.⁴ Generally the whole of a city street should be kept in a safe condition for travel.⁵

§ 1501. Municipal recourse against third persons.—If a municipal corporation, after being sued, has paid damages for

¹ *Goeltz v. Town of Ashland*, 75 Wis. 642, 645; *Cartright v. Belmont*, 58 Wis. 373; *James v. Portage*, 48 Wis. 681; *Prideaux v. Mineral Point*, 43 Wis. 523; *Matthews v. Baraboo*, 39 Wis. 677; *Hawes v. Fox Lake*, 33 Wis. 443; *Kelly v. Fond du Lac*, 31 Wis. 179, 186. In the last case the court laid down the rule which has since been followed in Wisconsin: — “The responsibility of towns, without doubt, primarily extends only to losses or damages sustained by reason of defects in the traveled portion of the highway, for they are not bound to keep the highway in its whole width in a suitable or safe condition for travel. It is in general the duty of the traveler, therefore, to remain in the traveled track, or that part of the highway which to a reasonable width has been graded or prepared for that purpose. Hence if without necessity or for his own pleasure or convenience he voluntarily deviates from the traveled track, which is in good condition, and in so doing meets with an accident from some cause outside of the traveled track, the town will not be responsible for any damage or injury he may thus sustain.”

² *Sykes v. Town of Pawlet*, 43 Vt. 446; *Walker v. Kansas City*, 99 Mo. 647, 652; *Potter v. Castleton*, 53 Vt. 435; *Rice v. Montpelier*, 19 Vt. 470.

³ *Monongahela City v. Fisher*, 111 Penn. St. 9; *Perkins v. Fayette*, 68 Me. 152; *Kelley v. Columbus*, 41 Ohio St. 263; *Keyes v. Marcellus*, 50 Mich. 439;

Wiley v. Portsmouth, 35 N. H. 304; *Durant v. Palmer*, 29 N. J. Law, 544; *Kellogg v. Northampton*, 4 Gray, 65.

⁴ *Whitney v. Essex*, 42 Vt. 520; *Ozier v. Hinesburgh*, 44 Vt. 230; *Aston v. Newton*, 134 Mass. 507; *Stafford v. Oskaloosa*, 57 Iowa, 748.

⁵ *Monongahela City v. Fisher*, 111 Penn. St. 9. See the not very satisfactory ruling in *Barr v. Kansas City*, 105 Mo. 550, but relying on *Lincoln City v. Smith*, 28 Neb. 762; s. c., 45 N. W. Rep. 41, and *Lindsay v. Des Moines*, 68 Iowa, 368; s. c., 27 N. W. Rep. 283, in the last of which the court says: — “We think the court should not have allowed the defendant to prove that there were over one hundred and fifty miles of sidewalk in the city of Des Moines; and the jury ought not to have been instructed that the extent of sidewalk in the city which has to be looked after may be considered in deciding whether the city officers used proper diligence in removing the snow and ice. It appears to us that the care and diligence required to keep sidewalks in proper condition cannot be affected or varied by the number of miles of walk in the city. If labor is necessary for the purpose, the force should be commensurate with the work to be done. In other words, a city with forty thousand inhabitants and one hundred and fifty miles of sidewalk should be held to the same degree of care in this respect as the smaller towns with less extent of sidewalk.”

injuries where the highway defect was caused by third persons' torts or negligence or by their breach of contract to repair, or has paid such damages without suit where the liability was undoubted, it may maintain an action against the third person for reimbursement, including such incidental expenses as it incurred in defending the action against itself.¹ In such cases the municipality is subrogated to the cause of action against the wrong-doer which the injured party originally had, and can recover against such wrong-doer only by proving his tort or negligence, the injury or the damage, and its payment.² Where a municipal corporation is sued for damages arising out of highway defects and has a cause of action against third persons for reimbursement, it may, by notice, impose the burden of defense on such third persons, and if they make default or do not defend successfully they are bound by the result of the suit, and cannot in any subsequent litigation between the municipality and themselves dispute the material facts on which the adjudication in the former suit rested.³ In such cases the liability of the third person does not depend on his receiving notice of the action of the injured party, but omission of such notice imposes upon the municipality the burden of establishing all the actionable facts.⁴ The notice to the third person need not be written or express, but may be implied from his knowledge of the pendency of the action and his participation in its defense.⁵ This right of action over against the third person is not affected by the fact that he was a licensee of the municipality to do a lawful act on the highway, for his implied agreement was to so act as to save the public from danger and the corporation from liability.⁶

¹ *Rochester v. Campbell*, 123 N. Y. 405, 411; *Rochester v. Montgomery*, 72 N. Y. 65; *Fulton Village v. Tucker*, 3 Hun, 529; *Brooklyn v. Brooklyn R. Co.*, 47 N. Y. 476; *Thompson on Negligence*, 791.

² *Rochester v. Campbell*, 123 N. Y. 405, 413; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Rochester v. Montgomery*, 72 N. Y. 65; *Robbins v. Chicago*, 4 Wall. 657.

³ *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Rochester v. Montgomery*, 72 N. Y. 67.

⁴ *Chicago v. Robbins*, 2 Black, 423; *Binsse v. Wood*, 37 N. Y. 530; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 281; *Aberdeen v. Blackmar*, 6 Hill, 324.

⁵ *Heiser v. Hatch*, 86 N. Y. 614; *Barney v. Dewey*, 13 Johns. 226; *Burr v. Pinney*, 12 Wend. 309.

⁶ *Mairs v. Manhattan &c. Assoc'n*, 89 N. Y. 503; *Congreve v. Morgan*, 18 N. Y. 84; *Seneca Falls v. Zalinski*, 8 Hun, 571; *Chicago v. Robbins*, 2 Black, 423; *Newton v. Ellis*, 85 Eng. C. L. 123.

§ 1502. **Transfer of liability.**—As before shown in the chapter on “Torts,” liability is commensurate with duty,¹ and therefore if the duty of keeping streets in repair is transferred from a town to a village or city therein the liability is also transferred;² but the mere fact of the incorporation of a city within the territory of the town does not render it jointly liable with the town for defective highways.³ A town is not relieved from its liability for the condition of a highway by the mere fact that a turnpike company has acquired a right from the legislature to use the highway for its purposes.⁴

§ 1503. **Liability when defects concur with other causes.** When the defect in a street concurs with another cause for which a municipal corporation is not responsible, it must be such that without its operation the injury would not have occurred, or the corporation is not liable, and the evidence must so preponderate against the corporation as not to leave the jury to conjecture.⁵ Though a city or town may have been

¹ § 759, *ante*.

² *Hewison v. New Haven*, 87 Conn. 475.

³ *Embler v. Walkill*, 132 N. Y. 222.

⁴ *In re Rochester Electric R. Co.*, 133 N. Y. 351.

⁵ *Ring v. Cohoes*, 77 N. Y. 83, 88; *Harrington v. Buffalo*, 2 N. Y. Supl. 333. A slope over a sidewalk in a city, formed by sand and small stones that had washed out of an embankment from time to time, being allowed to accumulate, became covered with sleet and ice during a cold night; and a person in going to his place of business early in the morning, fearing to go down the steps in front of his house, attempted to walk over the slope, fell, and was injured. It was held that, if the accident was caused by the ice alone, the city would not be liable; but that if the condition of the slope, which the city had negligently allowed to be formed and remain over the walk, was a concurring cause of the fall, without which the

accident would not have happened, the city would be responsible. *Taylor v. Yonkers*, 105 N. Y. 202. In this case Finch, J., thus reviewed the authorities:—“The question involved has been quite earnestly debated in other States where it arose under statutes requiring towns to keep the streets safe and convenient. In Maine and Massachusetts it is held that if, besides the defect in the way, there is also another proximate cause of the injury contributing directly to the result, for which neither of the parties is in fault, the town is not liable. *Moore v. Abbott*, 32 Me. 46; *Moulton v. Sanford*, 51 Me. 127; *Marble v. Worcester*, 4 Gray, 395; *Billings v. Worcester*, 102 Mass. 329. These rulings are based largely upon two grounds: that the town is liable for the defect alone, and that the proportion of injury due to that cause is impossible to be ascertained. A contrary rule is held in Vermont and New Hampshire. *Hunt v. Pow-*

negligent in permitting a hole or obstruction to continue in the highway, yet it is not liable for an injury which is not the natural and probable result of such negligence, but produced by another independent and efficient cause;¹ such negligence must have been the sole efficient cause of the injury or the municipality is not liable.² In the application of the rule that,

nal, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197. We have already stated the rule to be in this State that the defect, even when a concurring cause, must be such that without its operation the accident would not have happened. Where the defect is the sole explanation of the injury there is no difficulty; but where there is also another for which no one is responsible, we have held that the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. *Searles v. Manhattan R. Co.*, 101 N. Y. 661. And we added that he must fail also if it is just as probable that the injury came from one cause as the other, because he is bound to make out his case by a preponderance of evidence, and the jury must not be left to a mere conjecture or to act upon a bare possibility."

¹ Plaintiff had been driven safely past a hole in the road, and a pile of stones placed on a highway by the town supervisors, when the horse became frightened by a donkey, turned short round, breaking a wheel of the buggy, and ran back, one axle dragging on the ground. The dragging axle caused the buggy to be drawn to the side of the road, where it caught in the hole. The buggy was upset, and plaintiff injured. Held, that the township was not liable; the occurrence being extraordinary, and not the natural and probable result of the negligence, but of an independent, primary, efficient, proximate cause. *Schaeffer v. Township*

of Jackson (Pa. Sup., 1892), 24 Atl. Rep. 629. See, also, *Beall v. Athens*, 81 Mich. 536. In *Kieffer v. Hummets-town* (Pa., Oct., 1892), 17 Lawyers' Rep. 217, it was held that a pile of stones on the roadside leaving a space for travel of twenty-six feet will not render a borough liable for an injury to a person thrown upon the stones by the fall of the horse he is riding where this is occasioned by the struggles of another horse in his team which is frightened by the shooting of guns near the road. See, also, *Jackson Township v. Wagner*, 127 Penn. St. 184; *Beach on Contributory Negligence* (2d ed.), § 245.

² *Herr v. Lebanon* (Pa.), 24 Atl. Rep. 207. In *Chartiers Township v. Philips*, 122 Penn. St. 601, it was held to be error not to charge as requested that "to render a township liable for an injury by a defect in a highway it must have been the sole efficient cause of the injury, and if the jury find from the evidence that this accident to the plaintiff was caused by the uncontrollable struggle of a choking horse, or from this cause concurring with a defect in the highway, then their verdict must be for the defendant." In *Moulton v. Sanford*, 51 Me. 127, it was decided that if there be two efficient independent proximate causes, the primary being one for which the town is not responsible and the other a defect in the highway, the injury cannot be said to have been received through such defect and the town is not liable therefor.

in order to recover for an injury caused by a highway defect, the defect must have been the sole cause of the accident, the instruction was held to be correct that if there was only a momentary loss of control of plaintiff's horse, and the control would have been instantly regained if plaintiff's carriage had not come in contact with the defect, the plaintiff could recover.¹ It is obvious that where a horse gets wholly beyond the control of the driver the highway defect cannot be the sole cause of an accident.²

§ 1504. Plaintiff's concurring act in cases of danger and exigency.— When a person's injury is the natural consequence of his proper attempt to avoid a defect in the highway, for example, where in the attempt to avoid a mud hole, in the darkness he drives off the road at the side, he should not be charged with contributory negligence.³ And this rule applies where, to avoid apparently imminent danger caused by the defect, a person jumps from a carriage and is injured;⁴ but does not apply where the concurring cause is the negligence of the driver of the carriage in which plaintiff is riding.⁵ A town may be liable for a defect in a highway although the innocent act of a third person is a concurring cause of the injury.⁶ The exigency in which a person finds himself may

¹ Babson v. Rockport, 101 Mass. 93.

² Roccell v. Lowell, 7 Gray, 100; Richards v. Enfield, 13 Gray, 344; Davis v. Dudley, 4 Allen, 557; Stickney v. Salem, 3 Allen, 374; Titus v. Northbridge, 97 Mass. 258.

³ Pomeroy v. Westfield, 154 Mass. 462.

⁴ Flagg v. Hudson, 142 Mass. 280; Williams v. Leyden, 119 Mass. 237; Sears v. Dennis, 105 Mass. 310; Lund v. Tyngsboro, 11 Cush. 563. See, also, Beach on Contributory Negligence (2d ed.), § 40, and numerous cases there cited.

⁵ Kidder v. Constable, 7 Gray, 104; Russell v. Lowell, 7 Gray, 100. See, also, Beach on Contributory Negligence (2d ed.), § 115.

⁶ Hayes v. Hyde Park, 153 Mass. 514, where a telephone wire out of place caught in the wheels of a

wagon approaching that of plaintiff and he saw it and called to the driver who paid no attention to him; plaintiff was unable to turn out and was hurt in bending back to avoid the wire, and the town was held to be liable. Holmes, J., said:— "If the act which concurs with the defect in producing the result complained of is imminent, and is of a kind which the defendant is bound to expect and provide for, such, for instance, as another man's driving upon the road, the jury may find against the town, as when a particular state of the weather is the concurring cause. It can make no difference whether the defect brings the plaintiff into contact with the innocent vehicle, as in Flagg v. Hudson, 142 Mass. 280, or the innocent vehicle brings the plaintiff into contact with the defect, as the

affect the question how far he ought to appreciate the danger, and how far he can run a risk, which ought not ordinarily to be incurred, without losing his right to recover.¹

§ 1505. Limited liability in grading streets.— A city is not liable to an abutting owner for a merely consequential injury to his property caused by changing the grade of an adjoining street,² but is liable for a physical invasion of his property and such an infringement upon his right to lateral support to his soil as undermines his land and wrecks his buildings.³ The provision of the Missouri constitution that private property shall not be taken or damaged for public use without just compensation applies where property is damaged by a change in the grade of a street, though there was a charter power to change the grade.⁴ In Illinois, provided no property of an abutting owner is taken in the course of a change of grade or other improvement, he cannot recover for a consequential injury unless his whole property has been depreciated by the improvement, and this fact of depreciation is to be determined by comparing market values before and after the improvement.⁵ Under the Pennsylvania constitution a municipal corporation is liable to an abutting owner for an injury to his

jury might find to have been the fact here. The act of the third party is equally necessary to the result and is equally innocent in the two cases."

¹ *Pomeroy v. Westfield*, 151 Mass. 462, 465.

² *Kehrer v. Richmond*, 81 Va. 745. Compare *Keating v. Cincinnati*, 38 Ohio St. 141, with *Cincinnati v. Penny*, 21 Ohio St. 489.

³ *Stearns v. Richmond*, 88 Va. 992, where in changing the street grade the city excavated to the depth of sixty feet, causing plaintiff's land to cave in so as to destroy the wall of a brick building twenty feet from the street line. It was held that there was a taking of plaintiff's property, and that the damage was direct, not consequential; following *Pumpelly v. Green Bay Co.*, 13 Wall. 166. See, also, the very recent case in the State

of Washington, *Parke v. Seattle* (Oct., 1892), 31 Pac. Rep. 310, where the court criticised the rule laid down by Judge Dillon (§ 990) as not being wholly sustained by his own citations, and followed the decision in the above-cited case of *Stearns v. Richmond*. See, also, *Thurston v. St. Joseph*, 51 Mo. 510, overruling *St. Louis v. Gurno*, 12 Mo. 414.

⁴ *Van Da Vere v. Kansas City*, 107 Mo. 83; *Sheehy v. Railroad*, 94 Mo. 574; *Householder v. Kansas City*, 83 Mo. 488.

⁵ *Springer v. Chicago*, 135 Ill. 552; *Elgin v. Eaton*, 83 Ill. 535; *Francis v. Railroad Co.*, 70 Ill. 238; *Hall v. Railroad Co.*, 90 Ill. 42; *Haller v. Railroad Co.*, 82 Ill. 208; *Capps v. Railroad Co.*, 67 Ill. 607; *Eberhart v. Railroad Co.*, 70 Ill. 347; *Maher v. Railroad Co.*, 91 Ill. 312; *Loeb v.*

property caused by a change of grade.¹ Before the act of 1872 the city of New York was under no common-law or statutory liability to owners of real estate for injury to their property caused by changes of grade in the streets adjoining their premises;² and under said act of 1872 its liability was limited to a claim by such owners for the delivery of assessment bonds for the amount of damages respectively awarded to them by the board of assessors.³ But a city is liable for an injury caused, not by the action of the city or its common council in establishing a grade, but by the street committee in adapting a sidewalk to the grade in violation of the requirements of the common council.⁴ Where the duty of changing the grade of a highway is imposed by law upon others than the highway authorities, as, for instance, upon a railroad company, such company is not liable to abutting owners for injury consequentially resulting from such grading.⁵

§ 1506. Liability in respect to latent defects.—It is not the duty of a town, without notice, to protect travelers against latent defects in its highways.⁶ A continued mud-

Railroad Co., 118 Ill. 203; *Stein v. Railroad Co.*, 75 Ill. 41, *Page v. Railroad Co.*, 70 Ill. 324.

¹ In *O'Brien v. Philadelphia*, 150 Penn. St. 589, it was held that a property owner who has built upon his lot in conformity with the existing grade of an open highway can recover from the city for depreciation of his property caused by changing the actual physical elevation of the highway in front of the lot to conform to a plan regulation legally confirmed after he built, said plan being the first regulation of grade and differing from the elevation of the old highway. See, also, *New Brighton v. Peirsol*, 107 Penn. St. 280; *Jones v. Bangor Borough*, 144 Penn. St. 638; *Ogden v. Philadelphia*, 143 Penn. St. 430.

² *Heiser v. New York*, 104 N. Y. 68, 72; *Conklin v. New York & C. R. Co.*,

102 N. Y. 107; *Radcliff v. Brooklyn*, 4 N. Y. 195; *Wilson v. New York*, 1 Den. 595. In *Lynch v. New York*, 76 N. Y. 60, it was held that the city had the right to fill up and grade a street though thereby the surface water of adjoining lots was prevented from flowing upon the street, and the water thrown upon said lots was caused to flow upon these in a different way and in greater quantity.

³ *Heiser v. New York*, 104 N. Y. 68.

⁴ *Clemence v. Auburn City*, 66 N. Y. 334.

⁵ *Conklin v. N. Y. & C. R. Co.*, 102 N. Y. 107; *Uline v. N. Y. Central R. Co.*, 101 N. Y. 98; *Bellinger v. N. Y. Central R. Co.*, 23 N. Y. 42. *Contra*, *Fletcher v. Auburn R. Co.*, 25 Wend. 462.

⁶ *Wakeham v. St. Clair Township* (Mich., 1892), 51 N. W. Rep. 696.

hole in a road-bed, the danger of which is concealed by the water which fills it, is not a latent defect.¹

§ 1507. Municipal liability as to snow and ice.—A city is bound only to reasonable diligence, during freezing weather, to remove from its sidewalks ice formed from natural causes;² and cities and villages are not held liable for injuries caused by snow and ice, except where their neglect of duty is very clear.³ The evidence must be consistent and preponderate against the corporation.⁴ Such neglect is ordinarily a question for the jury on all the facts of quantity, weather, amount of travel, and lapse of time since the snow fell or ice formed.⁵

¹ In *Pettingill v. Town of Olean*, 48 N. Y. St. Rep. 96 (Oct., 1892), the hole causing the injury, the character of which was concealed by the water which filled it, had existed for nearly a month. The highway commissioner had several times passed it on inspection tours and failed to discover it. It was held that the jury were warranted in finding that the hole's existence at the time of the injury was due to the commissioner's negligence.

² *Kaveny v. Troy*, 108 N. Y. 571.

³ *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 470; *Smith v. Chicago*, 38 Fed. Rep. 388. A city is not liable for injuries occasioned by the slippery condition of a sidewalk, produced merely by smooth ice of recent formation. *Kinney v. City of Troy*, 108 N. Y. 567; s. c., 15 N. E. Rep. 728. When a sidewalk has been regularly cleared of snow within a reasonable time after it has fallen, but the surface has been generally coated with ice from natural causes, and plaintiff is injured by falling on such walk, the city is not liable, though the ice on which he slipped was formed by water dripping from a roof. *Kaveny v. Troy*, 108 N. Y. 571; s. c., 15 N. E. Rep. 726. In an action for injuries caused by slipping on an icy sidewalk, it ap-

peared that the accident occurred on Sunday; that the condition of the walk was caused by sleet which fell the night before; that the walk had previously been kept reasonably safe; and that there was nothing peculiar about the formation of the ice that contributed to the fall. It was held that the plaintiff could not recover. *Harrigan v. Village of Hoosic Falls*, 1 N. Y. Supl. 57. See, also, *Beach on Contributory Negligence* (2d ed.), § 270 *et seq.*

⁴ *Foley v. Troy*, 45 Hun, 396. In an action against a village for injuries caused by slipping on an icy sidewalk, the evidence showed the ice to be two inches deep or more. The time for which it had been there was variously stated at "all winter," "two or three weeks," and "four or five days." The ice was caused by water from melting ice running over the walk, there being no gutter opened to carry it away. Within four or five days before the accident it had rained and snowed, and it then froze. No ashes or other material had been placed on the ice. Held not evidence of negligence sufficient to warrant a recovery. *Gram v. Village of Greenbush*, 3 N. Y. Supl. 76.

⁵ In an action against a city to recover damages for a personal injury

The plaintiff should be nonsuited where the ice is of such recent formation as to exclude all question of notice or negligence,¹ and where the probability that an actionable defect caused the injury is wholly speculative.² Where a film of ice over a whole city is caused by a sudden fall of temperature, and it is impracticable to remove it, the city is not negligent in waiting for a thaw before acting.³ But the formation of ice in a particular locality, owing to the construction or condition

received by the plaintiff by falling on the defendant's sidewalk, owing to the negligence of defendant in not removing ice and snow which had formed a ridge thereon, the question whether the defendant should have known of such obstruction, and removed it, is one for the jury to determine from all the circumstances,—the extent of the snow-fall, condition of the weather thereafter, amount of travel on the street, and the lapse of time between the snow-fall and the accident. *City of Boulder v. Niles*, 9 Colo. 415; s. c., 12 Pac. Rep. 632.

¹ Plaintiff's evidence showed that the accident occurred by her slipping on some ice that had accumulated that day near the outside edge of the sidewalk, caused by water dripping from the edge of an awning which extended over the walk, and freezing as it touched the stone pavement. It was held that the court properly ordered a nonsuit. *Hanson v. Borough of Warren (Pa.)*, 14 Atl. Rep. 405. Where plaintiff was injured by stepping on ice, about two inches thick, which had formed on the sidewalk, but failed to show how, or how long, it had been formed, or that any officer of the city knew, or could by reasonable diligence have known, of it before the injury, it was proper to direct a verdict for defendant. *Stanton v. City of Salem*, 145 Mass. 476; s. c., 14 N. E. Rep. 519. Where plaintiff was injured at 7 o'clock in the evening by

falling on a slippery sidewalk, and the evidence showed that the icy condition of the walk was caused by the rain that had fallen during the afternoon, the city is not chargeable with constructive notice of the condition of the walk. *Springer v. City of Philadelphia (Pa.)*, 12 Atl. Rep. 490.

² In *Taylor v. Yonkers*, 105 N. Y. 202, Finch, J., said:—"The great balance of probability is that the ice was the efficient cause; there is no probability not wholly speculative that the slope was also such. No knowledge or intelligence can determine or ascertain that such a slope had any part or share in the injury, and to send the question to the jury is simply to let them guess at it. . . . For these reasons I think the plaintiff should fail and the motion for a nonsuit should have been granted."

³ *Taylor v. Yonkers*, 105 N. Y. 202; *Kaveny v. Troy*, 108 N. Y. 571; s. c., 15 N. E. Rep. 726. In an action for injuries resulting from a fall on an icy sidewalk, there being a conflict of evidence as to the quantity of ice and the length of time it had been on the walk, witnesses for defendant testifying that there was a thin film of ice that had frozen on the afternoon of the accident, it was prejudicial error to refuse to instruct that, if the ice had only been formed by rain or sleet that afternoon, plaintiff could not recover. *Keane v. Village of Waterford*, 2 N. Y. Supl. 183.

of the street or sidewalk, may be a defect though only smooth and slippery.¹

§ 1508. **The same subject continued.**—A city is not necessarily liable because of an old formation of ice or other accumulation if a recent formation over it renders the sidewalk as dangerous as it would have been without the former accumulation.² But if a dangerous ridge of ice is allowed to remain for several days in the middle of a sidewalk there is a presumption of municipal negligence;³ and the jury may

¹ *Adams v. Chicopee*, 147 Mass. 440; *Pinkham v. Tapsfield*, 104 Mass. 78; *Fitzgerald v. Woburn*, 109 Mass. 204. "A way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality." *Stanton v. Springfield*, 12 Allen, 563.

² *Taylor v. Yonkers*, 105 N. Y. 202; *Harrington v. Buffalo*, 2 N. Y. Supp. 833; *Kaveny v. Troy*, 108 N. Y. 571. In the last case *Finch, J.*, said:—"Doubtless the new ice came upon the old ice and possibly some addition was made to that from the drip of the eaves, but it cannot be said upon the evidence produced that the plaintiff would not probably have fallen if not a drop of water had come from the eaves, or that the freezing of that drip was the proximate cause of her fall." The injured person fell on a ridge of old ice about two feet long and six inches wide, and frozen about two inches deep. There was evidence that the ridge had been on the sidewalk for several days. The evidence was conflicting as to whether there was a fall of snow, sleet and rain on the day of the accident. Held, that a refusal to charge that if the sidewalks were made generally slippery on the evening of the accident by a fall of sleet or snow that day, so that the side-

walk, at the place of the accident, would have been slippery without regard to the ice previously formed, defendant was not liable, was reversible error. *Tobey v. Hudson*, 2 N. Y. Supl. 180. Where there is evidence that eight inches of snow fell within one day of the accident, and that before such storm there was no ice at the place of the accident, a refusal to charge that if the accident was caused by such storm, or ice formed from it, the city is not liable, is error, where plaintiff fails to show that the dangerous condition of the walk, resulting from such storm, continued any length of time; though there was evidence to warrant the jury in finding that the walk was in dangerous condition from previous storms. *Duncan v. Buffalo*, 2 N. Y. Supl. 503.

³ In an action against a city for injuries sustained by a fall on an icy sidewalk, evidence that there was, at the time of the accident, an oval ridge of ice six inches high, in the middle, sloping to the edges of the walk; that it had snowed three times within the eleven days preceding, aggregating twenty inches of snow, the last fall being five days before the accident, justifies the jury in finding that the ice resulted from the fall of snow referred to, and that the city had notice of its existence. *Harrington v.*

properly consider such a construction and maintenance of a sidewalk as causes frequent accumulation of ice.¹ A city having a charter power to require lot-owners to clear the snow from the adjoining sidewalks may wait a reasonable time for them to do so, but on their failure must itself do it.²

§ 1509. The same subject continued — Notice.— A city is held to stricter liability where the ice producing the injury does not come from natural causes, such as the freezing of rain or sleet, but from the negligent escape of water in winter weather;³ but is not liable without actual or implied notice where the water was thrown upon the street by an unauthorized person.⁴ In the State of New York a city is not bound to prevent the formation of ice on a sidewalk from the drip

Buffalo, 2 N. Y. Supl. 333. A verdict for plaintiff for injuries received from an icy sidewalk will not be disturbed on appeal, where there is evidence that there had been for a long time a thick coating of ice where plaintiff fell, and that other sidewalks in the vicinity had been cleared. *Provost v. New York*, 3 N. Y. Supl. 531. It appeared that the snow as it fell from time to time during the winter had not been cleaned off, but had been trodden down, and had become an uneven or humpy surface, which had been suffered to remain for about six weeks. The city was held liable. *Jones v. Troy*, 4 N. Y. Supl. 792.

¹ Where it was shown that the sidewalk at the place of the accident had a greater slant towards the street than it had elsewhere, and a part of it had settled so that water ran towards the end of the walk, where ice frequently accumulated, while the walk was otherwise dry; and if was recognized by residents as a dangerous spot, a verdict for plaintiff was sustained. *Ayres v. Hammondsport*, 7 N. Y. Supl. 174. In an action against a city for injuries caused by falling on an icy sidewalk, it appeared that at the place of the accident the sidewalk was covered with

ice for a distance of about twenty-five feet. The ice was formed by water flowing down from an embankment and freezing. It had alternately thawed and frozen for two or three weeks. The ice was in several layers, and at the time had a slight covering of snow. It did not appear that the streets were in a generally icy condition. The court held that notice to the city might be presumed from the long-continued accumulation. *Ney v. Troy*, 3 N. Y. Supl. 679.

² *Taylor v. Yonkers*, 105 N. Y. 202.

³ *Todd v. Troy*, 61 N. Y. 506, 509. Plaintiff sued for injuries resulting from a fall caused by ice on a sidewalk formed from the overflow of a leaky hydrant on the other side of the street. The testimony was conflicting as to whether the temperature was such that the ice could have been for any time on the sidewalk. It was held that, though the ice may have existed but a few days, the city was liable in allowing an escape of water which would inevitably cause ice when the weather was cold. *Corbett v. Troy*, 6 N. Y. Supl. 381; s. c., 53 Hun, 228.

⁴ *Foley v. Troy*, 45 Hun, 396.

of an adjoining owner's roof.¹ A heavy snow-storm is itself notice to a city that snow is obstructing its streets.²

§ 1510. Obstructions — Liability for.— The duty of keeping streets in repair includes the duty to keep them free from dangerous obstructions, and a city is liable for negligence in allowing such obstructions to continue after notice thereof may be imputed to it.³ This rule of liability applies to an obstruction placed by an abutting owner, in which case both he and the city may be liable.⁴ A heap of garbage may be such an obstruction,⁵ and a pile of frozen mud,⁶ and a pile of stones,⁷

¹ *Kaveny v. Troy*, 108 N. Y. 571.

² Where a considerable quantity of snow has fallen, which, from the nature of the case, must have caused some obstruction on the sidewalks of a city, it is the duty of the city authorities within a reasonable time thereafter to remove or cause to be removed such obstruction. The falling of snow is sufficient notice, and the question of negligence is for the jury. *Foxworthy v. City of Hastings*, 25 Neb. 133; s. c., 41 N. W. Rep. 132.

³ *Kunz v. Troy*, 104 N. Y. 344; *Weed v. Ballston Spa*, 76 N. Y. 329. The complaint alleged that the city negligently suffered the alleged obstruction and nuisance to remain upon the street after notice of its existence. It was held that the action was for the city's negligence and not for damages caused by the existence of a nuisance, as, after notice, the city was negligent in not removing the obstruction. *Frankel v. City of New York*, 2 N. Y. Supl. 294. See, also, *Welsh v. St. Louis*, 73 Mo. 71; *Fink v. St. Louis*, 71 Mo. 52; *Russell v. Columbia*, 74 Mo. 480; *Mayor v. O'Donnell*, 53 Md. 110; *Sides v. Portsmouth*, 59 N. H. 24; *McAllister v.*

Albany, 18 Oregon, 426. Where plaintiff was injured in attempting to pass dirt thrown on defendant's sidewalk, as it appeared, one or two days before, in the presence of and without objection from the street superintendent, the deposit will be presumed wrongful in the absence of proof of its necessity, and the sufficiency of the time for its removal is a question for the jury. *Shook v. City of Cohoes*, 108 N. Y. 648; s. c., 15 N. E. Rep. 531. A village which maintains a system of water-works is liable for injuries caused by its negligence in permitting the surface of a highway in which a water-box had been placed to wear away so that the water-box projected above the surface and obstructed the highway. *Wilkins v. Village of Rutland (Vt.)*, 17 Atl. Rep. 735.

⁴ Where a dangerous piece of machinery is placed in an alley by the owner of abutting lots and is allowed to remain for years, both the individual and the city are guilty of negligence, and both are liable for injuries sustained by a child under nine years who was hurt upon such machinery. *Osage City v. Larkins*, 40 Kan. 206; s. c., 19 Pac. Rep. 658.

⁵ In an action against a city by one

⁶ *Champaign v. Jones*, 132 Ill. 304. See, also, *Gallagher v. St. Paul*, 28 Fed. Rep. 305; *Stafford v. Oskaloosa*, 64 Iowa, 251.

⁷ *Wilson v. Spofford*, 32 N. Y. St. Rep. 532; *Bauer v. Rochester*, 35 N. Y. St. Rep. 959.

and a tree stump in a public park,¹ and a hydrant and a water-plug dangerously situated,² and a road-scraper,³ and a wagon stored in the highway.⁴ A heap of sand left by building contractors may be such an obstruction,⁵ the rule being that such building obstructions must not be allowed to become dangerous.⁶

§ 1511. The same subject continued — Obstructions for private convenience.— As the primary use of a city street is

who was overturned in a sleigh by driving over a pile of rubbish in the street the evidence for plaintiff was that, as he was slowly driving up to the curbstone to alight after dark, without observing the obstruction, he was upset and seriously injured. The street was a frequented one and plaintiff had never noticed an obstruction there before. The rubbish was a pile of garbage about two feet high and six or eight feet long, and had been there three weeks. On the part of defendant there was evidence that no such pile existed, or, if any, that it was too small to have produced the accident. The evidence was held to justify a verdict against the city. *Kane v. Troy*, 1 N. Y. Supl. 536.

¹ *Wolfe v. Tel. Co.*, 33 Fed. Rep. 320.

² *King v. Oshkosh*, 75 Wis. 517; *Adams v. Oshkosh*, 71 Wis. 49; *Scranton v. Catterson*, 94 Penn. St. 202; *Indianapolis v. Cook*, 99 Ind. 10.

³ *Whitney v. Ticonderoga*, 37 N. Y. St. Rep. 135.

⁴ *Cohen v. New York*, 113 N. Y. 532; *Callanan v. Gilman*, 107 N. Y. 360.

⁵ Under Howell's Statutes of Michigan, section 1442, making municipal corporations liable for injuries to persons by reason of neglect to keep streets, etc., "in good repair and in a condition reasonably safe and fit for travel," one injured while driving in a street in the dark by a heap of

sand left there by contractors building a house, which heap extended half-way over the traveled portion of the road, and had been there for a month and was unguarded by lights or signals, may recover of the city. *Joslyn v. Detroit*, 74 Mich. 458; s. c., 42 N. W. Rep. 50.

⁶ Under Revised Statutes of Ohio of 1889, section 2640, relating to municipal corporations, and providing that the council shall have the care, supervision and control of public highways, streets, etc., within the corporation, and shall cause the same to be kept open and in repair and free from nuisance, where a city has granted permits for the occupation of part of a street for the purpose of depositing building materials, requiring the locality to be indicated by proper lights during the night, its failure to exercise reasonable diligence in preventing such obstruction as may be dangerous to passers-by will render it liable for any damages that may be sustained by reason of the obstruction. *City of Cleveland v. King*, 132 U. S. 295; s. c., 10 S. Ct. 90. In an action for injuries sustained by driving at night against building material left in the street, a question whether it was not placed as such material is usually placed is properly excluded, especially as it calls for an opinion and not for facts. *Magee v. City of Troy*, 1 N. Y. Supl. 24.

for the passing and repassing of the public throughout its entire width, a city is liable for permitting such an obstruction of a street by any individual as constitutes a nuisance. Except for building purposes and for the loading and unloading of wagons, individuals must not be allowed to obstruct or encroach upon streets for any private purpose, and a city will be held liable for authorizing or permitting such obstructions. This rule of liability was applied in 1889 with considerable strictness by the Court of Appeals in a case where the city of New York, had in violation of the city consolidation act, given a permit or license to a grocer to store his wagon on the street;¹ and the court fortified such application by invoking the English doctrine that the king's highway is not to be used as a stable yard nor a private person be allowed to eke out the inconvenience of his own premises by taking in the highway.² The legislature has expressly provided by the consolidation act before referred to,³ that New York city shall have no power to authorize the placing or continuing of any obstructions upon any street or sidewalk except temporarily during the erection or repair of a building on a lot opposite the highway.⁴

¹ *Cohen v. New York*, 113 N. Y. 532.

² *King v. Russell*, 6 East, 427; *Rex v. Cross*, 3 Camp. 224; *Rex v. Jones*, 3 Camp. 230; *People v. Cunningham*, 1 Denio, 524; *Davis v. Mayor*, 14 N. Y. 506, 524.

³ § 86, subd. 4.

⁴ *People v. Mayor &c.*, 59 How. Pr. 277; *Ely v. Campbell*, 59 How. Pr. 333; *Lavery v. Hannigan*, 20 J. & Sp. 463. The opinion in the *Cohen* case above cited (113 N. Y. 532) is so valuable as to justify its transcription here. *Peckham, J.*, said:—"The storing of a wagon in the highway was a nuisance. The primary use of a highway is for the purpose of permitting the passing and repassing of the public, and it is entitled to the unobstructed and uninterrupted use of the entire width of the highway for that purpose, under temporary exceptions

as to deposits for building purposes, and to load and unload wagons, and receive and take away property for or in the interest of the owner of the adjoining premises, which it is not now necessary to more specifically enumerate. The extent of the right of such exceptional user was before us in the late case of *Callanan v. Gilman*, 107 N. Y. 360, and nothing more need be said regarding it here. It is no answer to the charge of nuisance that even with the obstruction in the highway there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. If it be permanently, or even habitually in the highway, it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such

§ 1512. Liability for structures over the street.—A permanent awning or other structure having its support within the street and extending over it, and so insecure as to be dangerous, is a defect in the street which the city is bound to re-

use of the public streets. Familiar as the law is on this subject, it is too frequently disregarded or lost sight of. Permits are granted by common councils of cities, or by other bodies, in which the power to grant them for some purposes is reposed, and they are granted for purposes in regard to which the body or board assuming to represent the city has no power whatever and the permit confers no right upon the party who obtains it. As was said by Lord Ellenborough in the case of *Rex v. Jones*, 3 Camp. 230, the law upon the subject is much neglected, and great advantages would arise from a strict, steady application of it. This case is a good example of its neglect. There is no well-founded claim of the existence of a power in the defendant to issue such a license. . . . The owner of this wagon was not a cartman, nor was the wagon used as a public cart, but only as a means to enable the grocer to transact his own private business. He acquired no right by virtue of the license to store his wagon in the street, and in doing so he was clearly guilty of maintaining a nuisance. The defendant was also guilty. It assumed to authorize the erection and continuance of a public nuisance. To be sure the legal powers to grant the license to obstruct the street was by the legislature withheld from the defendant, yet it did grant just such a permit and took compensation on account of it. In thus doing the city became a partner in the erection and continuance of such nuisance. . . . Under such circumstances the defendant might be held liable the same as if

it had itself maintained the nuisance, for the owner of the wagon was nothing more than an agent through whom the defendant did the unlawful act. *Irvine v. Wood*, 51 N. Y. 224. . . . There is always reasonable ground for apprehending accidents from obstructions in a highway, and any person who wrongfully places them there or aids in so doing must be held responsible for such accidents as occur by reason of their presence. . . . We think that in a case like this where no obstruction would have existed but for the wrongful conduct of the defendant, it must be held responsible for the damage which is caused by reason of the obstruction, even though it might not have happened if the licensee had been careful in regard to the manner in which he exercised the assumed right granted him by the license. The defendant under these circumstances must take the risk of such care, and not an innocent passerby. This is not a case for the application of the doctrine that where the injury results from the negligent mode in which licensee exercises the privilege granted to him, which mode is not part of the license, there must be proof of negligence showing permission to use, and acquiescence in the mode after notice or knowledge on the part of the licensor. That may be the rule where the thing licensed is legal because of the license, and the illegality consists in the manner in which the license is carried out. The difficulty here does not consist alone in the negligent manner of fastening up the thills; but the license itself, the permission,

pair after notice, express or implied, though the structure was not made by the city or under its authority;¹ but the rule might be otherwise if the defect were secret or invisible,² or the structure gave way under a heavy weight of snow.³ Under the Massachusetts statute a reasonable distinction is made between a structure like an awning which is supported by the sidewalk and adapted to its use, and a structure like a sign which merely projects over the sidewalk; a city may be liable for the former,⁴ but not ordinarily and to the same extent for the latter.⁵ In some jurisdictions dangerous structures suspended or projecting over a street are treated as nuisances, and municipal corporations held to be liable for not abating them.⁶

§ 1513. **Municipal liability for fright of horses.**—A highway may be rendered defective and unsafe, with consequent liabilities therefor, by objects placed or permitted to remain upon it which are calculated to frighten horses of ordinary gentleness.⁷ A Vermont town was held liable for allowing

with or without consideration, to obstruct the street at all for any such purpose as was the case here, is the wrongful act on the part of the defendant which renders it responsible for the damage naturally sustained from such obstruction."

¹ *Hume v. New York*, 74 N. Y. 264. In an action against a city for personal injuries caused by the falling of an awning on plaintiff while passing along the sidewalk, evidence that the awning for several years had been covered with boards in violation of an ordinance, and that snow had been allowed to accumulate on it for some time before the accident, the weight of which caused the fall, is sufficient to warrant a finding that the city was chargeable with notice of its defective condition. *Bieling v. City of Brooklyn*, 120 N. Y. 98; s. c., 24 N. E. Rep. 389.

² *Hume v. New York*, 74 N. Y. 264, 276; s. c., 47 N. Y. 639.

³ *Hume v. New York*, 47 N. Y. 639.

⁴ *West v. Lynn*, 110 Mass. 514; *Drake v. Lowell*, 13 Met. 292; *Day v. Milford*, 5 Allen, 98.

⁵ *Jones v. Boston*, 104 Mass. 75; *Salisbury v. Hershenroder*, 106 Mass. 458. A suspended flag and weight which caused the injury by falling were held not to be a defect in the highway within the meaning of the statute. *Hewison v. New Haven*, 37 Conn. 475; *Barber v. Roxbury*, 93 Mass. 318. See, also, *Hixon v. Lowell*, 13 Gray, 59; *Vinal v. Dorchester*, 7 Gray, 421; *Stanton v. Springfield*, 12 Allen, 566; *Hutchins v. Boston*, 12 Allen, 571.

⁶ *Champlin v. Penn Yan*, 34 Hun, 33; *Grave v. Fort Wayne*, 45 Ind. 429; *Bohen v. Waseca*, 32 Minn. 176; *Duffy v. Dubuque*, 63 Iowa, 171.

⁷ *Eggleston v. Columbia Turnpike Co.*, 18 Hun, 146; *Champlin v. Penn Yan*, 34 Hun, 33, where the village was held liable for allowing an

bales of hay to lie at the roadside in such a manner as to startle horses;¹ and in Maine the same rule of liability was applied against a city for leaving in the traveled way a large rock calculated ordinarily to frighten horses;² and the rule is the same in Pennsylvania where a township permits the roadside to be used as a place of deposit for private property, and the person injured has the option to proceed against the township or the individual offender.³ In Michigan the municipality is not liable where a horse takes fright at an object like a log or stone outside of the wrought and traveled part of the highway.⁴ So in Massachusetts a town or city is not liable whether the object which causes the fright is at the side or margin of the highway,⁵ or within the traveled part of the way;⁶ but the individual who placed the offending obstruction is liable to the traveler;⁷ and it has been held that the town may be liable where an injury is caused by a horse shying at one defect and the carriage hitting the same or some other defect.⁸ Ordinarily the liability should be more strictly enforced where the offending object is within the

advertising banner to remain suspended above the street, and the court said: — "We are unable to discover any sensible reason for holding that an object permanently suspended directly over the traveled part of a highway, though fastened to supports outside the limits of the same, is not an obstruction to travel if it naturally tends to frighten horses of ordinary gentleness." See, also, *Chicago v. Hay*, 75 Ill. 530; *Rushville v. Adams*, 107 Ind. 475; *Bartlett v. Hooksett*, 48 N. H. 18; *Foshay v. Glen Haven*, 25 Wis. 288; *Stanley v. Davenport*, 54 Iowa, 463; *Hughes v. Fond du Lac*, 73 Wis. 380; *Ayer v. Norwich*, 39 Conn. 376; *Dimock v. Suffield*, 30 Conn. 129.

¹ *Morse v. Richmond*, 41 Vt. 435. The Vermont statute provides that "If any special damage shall happen to any person, his team, carriage or other property by means of the insufficiency or want of repairs of any

highway, the person damaged shall have the right to recover."

² *Card v. Ellsworth City*, 65 Me. 547. And see particular applications of the rule, not altogether harmonious, perhaps, in *Clark v. Lebanon*, 63 Me. 393; *Davis v. Bangor*, 42 Me. 522; *Lawrence v. Mt. Vernon*, 35 Me. 100; *Merrill v. Hampden*, 26 Me. 234.

³ *North Manheim v. Arnold*, 119 Pa. St. 380; *Piollet v. Simmers*, 106 Pa. St. 95.

⁴ *Beall v. Athens Township*, 81 Mich. 536; *Agnew v. Corunna*, 55 Mich. 428.

⁵ *Keith v. Easton*, 2 Allen, 552.

⁶ *Cook v. Montague*, 115 Mass. 571; *Cook v. Charlestown*, 98 Mass. 80; *Kingsbury v. Dedham*, 13 Allen, 186.

⁷ *Jones v. Housatonic R. Co.*, 107 Mass. 261; *Barnes v. Chapin*, 4 Allen, 444.

⁸ *Woods v. Groton*, 111 Mass. 357; *Bly v. Haverhill*, 110 Mass. 520; *Bigelow v. Weston*, 3 Pick. 267.

traveled way.¹ There are many familiar objects which ought not to frighten an ordinarily tame and gentle horse;² but whether any given object is so frightful in its appearance as naturally to scare a horse of ordinary gentleness is usually a question for the jury.³ It does not follow because one or more gentle horses have been frightened at a given object that it will frighten all gentle horses; and proof that a number of horses have been frightened at an object does not raise a legal presumption that another horse on a different occasion became frightened at the same object.⁴

§ 1514. **Duty to light streets — To light excavations, etc.** The mere neglect of a city to light its streets is not a ground of liability unless the duty so to light is imposed by its charter or by statute,⁵ it being one of the discretionary acts for neglecting which a city is not liable.⁶ An omission to light a street is not a defect in the way for which a city is liable, and a city is not liable for such omission by reason of a city ordinance requiring the street superintendent to erect lights.⁷ The duty to light excavations and dangerous obstructions on the streets at night exists where a charter imposes the duty to keep streets in a reasonably safe condition for travel.⁸ A city is liable for not lighting or otherwise sufficiently guarding excavations in its streets made by its authority⁹ or made by a third person if the city ought to have known it was un-

¹ *Nichols v. Athens*, 66 Me. 402.

² *Piollet v. Simmers*, 106 Pa. St. 95; *Mallory v. Griffey*, 86 Pa. St. 275.

³ *Chamberlain v. Enfield*, 43 N. H. 356; *Winship v. Enfield*, 42 N. H. 197; *Cleveland & Co. R. Co. v. Wynant*, 114 Ind. 425; *Fritsch v. Allegheny*, 91 Pa. St. 226.

⁴ *Cleveland & Co. R. Co. v. Wynant*, 114 Ind. 525; *Newsom v. Georgia R. Co.*, 62 Ga. 339; *Wentworth v. Smith*, 44 N. H. 419; *Piollet v. Simmers*, 106 Pa. St. 95; *Denver & Co. R. Co. v. Glasscott*, 4 Colo. 270; *Bloor v. Delafield*, 69 Wis. 273. But see *Darling v. Westmoreland*, 52 N. H. 401; *Crocker v. McGregor*, 76 Me. 282. See, also, § 761, *supra*.

⁵ *Miller v. St. Paul*, 38 Minn. 134; *Macomber v. Taunton*, 100 Mass. 255; *Freeport City v. Isbell*, 83 Ill. 440; *Randall v. Eastern R. Co.*, 106 Mass. 276.

⁶ *Gaskins v. Atlanta*, 73 Ga. 746.

⁷ *Lyon v. Cambridge*, 136 Mass. 419; *Fowle v. Alexandria*, 3 Pet. 398.

⁸ *McAllister v. Albany*, 18 Oregon, 426; *Storrs v. Utica*, 17 N. Y. 104.

⁹ *Butler v. Bangor*, 67 Me. 385; *Lewis v. Atlanta*, 77 Ga. 756; *Flater v. Detroit*, 70 Mich. 644; *Clark v. Richmond*, 83 Va. 355; *Baltimore v. O'Donnell*, 53 Md. 110; *Olathe City v. Mizee*, 48 Kan. 435.

guarded;¹ and the city cannot relieve itself of such liability by requiring the third person to provide proper lights.²

§ 1515. Crossings — Duty to keep safe.—In the absence of an express statutory duty to construct crosswalks a municipality is not liable for not constructing them.³ When once built crosswalks must be kept in repair as well as other parts of the street, and a city cannot negligently remove a crosswalk and escape responsibility by the mere fact that it no longer exists.⁴ Nor can it shift its primary responsibility upon an independent contractor.⁵ The danger resulting from leaving unguarded holes in a crosswalk is so obvious that a city is held to strict liability for such negligence.⁶ Foot passengers are not confined to crossings, but it is more prudent to use them.⁷

§ 1516. Sidewalk openings and excavations — Coal holes. A common danger in cities consists in unguarded openings in sidewalks leading to basements, and in respect to them the rule of liability for municipal negligence ought to be enforced; and an agreement for a valuable consideration in such a case not to sue the individual tort-feasor does not operate as a release to the city.⁸ The mere omission to have barriers about

¹ *Brusso v. Buffalo*, 90 N. Y. 679. In an action against a city for injuries sustained from an obstruction in one of its streets, evidence as to the condition of the street and the absence of lights prior to the accident is admissible, as tending to show that the city had, or ought to have had, knowledge of the defect, if it was created by a third person, and left unguarded by the city. *Pettengill v. City of Yonkers*, 116 N. Y. 558; s. c., 22 N. E. Rep. 1095. But see *Sinclair v. Baltimore*, 59 Md. 592.

² *Cleveland v. King*, 132 U. S. 295; *McAllister v. Albany*, 18 Oregon, 426; *Bauer v. Rochester*, 35 N. Y. St. Rep. 959.

³ *Williams v. Grand Rapids*, 59 Mich. 51.

⁴ *Alexander v. Big Rapids*, 76 Mich. 282.

⁵ *Jefferson Village v. Chapman*, 127 Ill. 438; in which case it was also held that the jury should not be instructed that, as a matter of law, the failure of defendant to light the streets at a certain crossing was not an act of negligence, and that, if the accident occurred solely from such failure, the plaintiff could not recover.

⁶ *Finn v. Adrian City* (Mich., 1892), 53 N. W. Rep. 614.

⁷ *Brusso v. Buffalo*, 90 N. Y. 679; *Raymond v. Lowell*, 6 Cush. 524, 530.

⁸ In *Chicago v. Babcock* (Oct., 1892, Ill.), 32 N. E. Rep. 271, a city ordinance provided that entrances to

such openings is not negligence as matter of law, but is a question of fact for the jury in the light of all the circumstances.¹ A deep, unguarded excavation or hole in a sidewalk is a defect therein as matter of law.² If a city permits coal holes in the sidewalks it may not be practicable for it to guard against the possibility of their being left open, but it is practicable to require a cover of such a kind that when it is shut the sidewalk is reasonably safe, though the cover is not fastened on the inside.³

areas and basements should not extend into the sidewalk more than two feet next to the building. In the case in question the opening into the basement extended into the sidewalk three feet, and its trap-door was open at the time of the accident, and had been open most of the time for three years. It was held that the city was negligent. See, also, *Smalley v. Appleton*, 75 Wis. 18.

¹ In action against a city for damages resulting to plaintiff from his falling into the open door of a cellar in a sidewalk, it is a question for the jury to determine whether the absence of guards or fences around the cellar door was, under all the circumstances, dangerous, and showed negligence on defendant's part; and it is error in the court to instruct the jury that defendant would be guilty of negligence if the door was at the time unfenced and without any guard. *Day v. City of Mt. Pleasant*, 70 Iowa, 193; s. c., 30 N. W. Rep. 853. An instruction in an action for injuries caused by falling down a cellar-way in a sidewalk that the fact that it was admitted that the stairway, with a railing on each of two sides and open on another, had existed within the limits of the sidewalk for a number of years, was sufficient to render the city liable for the injuries, is erroneous, as invading the province of the jury and ex-

cluding from their consideration other evidence than the admission. *City of Franklin v. Harter*, 127 Ind. 446; s. c., 26 N. E. Rep. 882.

² It is not error for the court to assume that an excavation in a sidewalk several feet deep is a defect in the walk, if not properly guarded. *McGrath v. Village of Bloomer*, 73 Wis. 29; s. c., 40 N. W. Rep. 585. Plaintiff may recover damages for injuries received by falling into an excavation near the sidewalk while exercising ordinary care, where the city was negligent in allowing such excavation to remain so near the sidewalk as to render it dangerous. *City of Lincoln v. Beckman*, 23 Neb. 677; s. c., 37 N. W. Rep. 593.

³ In *McGaffigan v. Boston*, 149 Mass. 289, the city was held liable for not requiring such a cover; and in *Hanscom v. Boston*, 141 Mass. 242, where there was no evidence that the coal hole and cover were improperly constructed, or that there was anything in their appearance that indicated any defect or that it had ever before been out of place, and no evidence that the city officers had knowledge that the cover was not fastened down on the inside, the court held there was no evidence that the city had reasonable notice of any defect, or might have remedied it by the exercise of reasonable care and diligence.

§ 1517. **Duty as to railings and barriers.**—In some jurisdictions it has been held that negligence may consist as well in the omission to erect barriers in dangerous places at the side of a highway as in having the road-bed defective.¹ In other jurisdictions it has been held that a defect in a highway in order to be actionable must to some extent obstruct the passage of the traveler who is injured,² and ordinarily the obstruction must be within the traveled portion of the highway.³ This duty to provide railings and barriers, from the nature of the case, is not absolute, but must depend on the degree of danger; it is not negligent not to guard against an accident which is never likely to happen;⁴ but a dangerous and unguarded precipice at the side may be almost as dangerous as in the middle of a highway.⁵ The municipality is not liable for the absence of a barrier or a defective one if it was not the primary cause of the injury.⁶ A city or town is under no

¹ *Bryant v. Town of Randolph*, 133 N. Y. 70; *Ivory v. Town of Deerpark*, 104 N. Y. 476; *Malloy v. Walker Township*, 77 Mich. 448. The cases of *Hubbell v. Yonkers*, 104 N. Y. 434, and *Monk v. Utrecht*, 104 N. Y. 552, are distinguished by the fact that the embankments at the side did not need a rail or barrier, because of the elevated sidewalks, etc., which were between the highway and the embankment.

² Therefore in *Kingsbury v. Dedham*, 95 Mass. 186, a pile of gravel in the middle of the road, though causing a horse to take fright, was not such a defect, because the traveler did not come into contact or collision with it.

³ *Keith v. Easton*, 2 Allen, 552. See note by Judge Redfield, 7 Am. L. Reg. (N. S.) 785.

⁴ *Hubbell v. Yonkers*, 104 N. Y. 434; *Wilson v. Atlanta*, 60 Ga. 473; *Murphy v. Gloucester*, 105 Mass. 470; *Commonwealth v. Wilmington*, 105 Mass. 599.

⁵ *Orme v. Richmond*, 79 Va. 86. See, also, *Kennedy v. New York*, 73

N. Y. 365; *Pittston Borough v. Hart*, 89 Penn. St. 389; *Atlantic v. Wilson*, 59 Ga. 544; *Williams v. Clinton*, 28 Conn. 264; *Freeport v. Isbell*, 83 Ill. 440; *Bassett v. St. Joseph*, 53 Mo. 290; *Bryant v. Randolph*, 133 N. Y. 70. Where plaintiff's horse, which he is driving, runs over a bank, and is injured, by failure of the city to maintain proper railings, the city is liable, though the horse had become unmanageable from fright. *Byerly v. City of Anamosa*, 79 Iowa, 204; S. C., 44 N. W. Rep. 359.

⁶ *Beall v. Athens Township*, 81 Mich. 536, where the township was not liable for the absence of barriers, because the primary cause of the accident was the horse taking fright at a log outside of the traveled path; and *Smith v. Sherwood Township*, 62 Mich. 159, where the court properly instructed the jury "that if they found that the hole was not such a defect as was calculated to frighten horses ordinarily roadworthy, and the township was not in fault in reference to that, or to blame for the fright of the horse in the first in-

obligation to put up a railing to prevent travelers straying from the highway into a dangerous place not in proximity to the highway;¹ the test of municipal liability in this class of cases is whether there is such a risk of a traveler, using ordinary care, and passing along the way, being thrown or falling into the dangerous place that a railing is required to make the way itself safe and convenient.² A city is not liable for the absence

stance, then the plaintiff could not recover on account of the defective rail or post." One who is injured by being thrown from a carriage, caused by its going down an embankment on the side of an avenue, cannot recover from the city therefor on the ground that it should have provided a railing along the side of the avenue, when it appears that the horse drawing the carriage had become unmanageable before coming on the avenue, and about one hundred and sixty-six feet from the alleged defect, and had run away, crossing the avenue at right angles. *Higgins v. City of Boston*, 148 Mass. 485; s. c., 20 N. E. Rep. 105. A team ordinarily quiet and steady, attached to a wagon, were standing in a public street, when they became frightened and unmanageable, and backed over a precipice negligently left unguarded by the city, whereby plaintiff, who was in the wagon, was injured. It was held that the frightened and unmanageable condition of the team was not the independent cause of the injury, and that, in the absence of any evidence of contributory negligence, the city was liable. *Olson v. City of Chippewa Falls*, 71 Wis. 558; s. c., 37 N. W. Rep. 575.

¹ *Hudson v. Marlborough*, 154 Mass. 218, where the court said:—"The ruling that if the place where the accident occurred was twenty-five feet from Pleasant street the town would not be liable was clearly correct. In such a case as that, the place where

the accident occurred would not, as matter of law, be in such immediate proximity to the road as to require the town to put up a railing in order to make the road safe and convenient for travelers." In *Barnes v. Chicago*, 138 Mass. 67, the town was held not bound to erect barriers to prevent one traveling with a horse and wagon from straying from the highway though there was a dangerous place thirty-four feet from the traveled part of the road and nine and one-half feet from the line of location. See, also, *Daily v. Worcester*, 131 Mass. 452; *Puffer v. Orange*, 122 Mass. 389; *Warner v. Holyoke*, 112 Mass. 362; *Murphy v. Gloucester*, 105 Mass. 470.

² *Adams v. Natick*, 13 Allen, 429; *Alger v. Lowell*, 3 Allen, 402. In *Glasier v. Town of Hebron*, 131 N. Y. 450, the alleged negligence was the failure of the town to place a railing at the point where the accident occurred, so as to prevent any vehicle from being backed or drawn into the pond at that point. In order to get from the road to the water through the clearing or break in the woods, one driving would have to turn his horse at right angles with the road and drive or back his horse down to the pond. The court held that no accident was likely to happen there, and there was no negligence in failing to guard against a very unlikely possibility. Compare *Veeder v. Little Falls*, 100 N. Y. 343.

of railings or barriers on State highways which it is permitted to use.¹

§ 1518. Foundrous highway — Deviation from.— If a highway becomes suddenly impassable or foundrous, as it is then called, travelers may deviate from it upon adjoining land, and for that purpose may remove so much of the fence as will enable them to pass around the obstruction.² What will constitute the inevitable necessity that will justify such a deviation *extra viam* will depend upon the circumstances of each particular case, as, for instance, the nature of the obstruction and the exigency of the traveler.³ This right of deviation does not ordinarily exist in the case of a private way.⁴

§ 1519. When notice of defect may be imputed to municipality.— In the absence of actual notice of a highway defect the general rule is that a town or city is not liable for an injury caused by the defect, unless it has existed so long that notice or knowledge thereof should be imputed to the municipality.⁵ Notice may ordinarily be imputed by the jury where the defect has existed for a long time.⁶ Actual notice need

¹ Veeder v. Little Falls, 100 N. Y. 343; Carpenter v. Cohoes, 81 N. Y. 21.

² Williams v. Safford, 7 Barb. 309; Holmes v. Seeley, 19 Wend. 510; Campbell v. Race, 7 Cush. 408; Casey v. Rae, 58 Cal. 163; Ballard v. Harrison, 4 M. & W. 392.

³ Campbell v. Race, 7 Cush. 408; Morey v. Fitzgerald, 56 Vt. 487.

⁴ Arnold v. Holbrook, 28 L. T. (N. S.) 23; Taylor v. Whitehead, Doug. 745; Duncombe's Case, Cro. Car. 366.

⁵ If a step is properly constructed in the first instance, the city will not be liable for accidents caused by its getting out of repair, without proof that some of the city officers or agents having charge of such matters had actual notice of the defect, or proof that the defect had existed for such a length of time that the city authorities, by reasonable diligence in supervision, would or should have discovered it. Miller v. St. Paul,

38 Minn. 134; s. c., 36 N. W. Rep. 271. The afternoon before plaintiff was injured the hardest rain of the season fell. Before the rain, and afterwards, the marshal of the town went to the place, and examined it carefully, and could not detect any defect in the sidewalk or the sewer. The injury was caused by the dirt and sand becoming very wet from the hard rain, and caving in one side of the sewer. It was held that plaintiff was not entitled to recover, the defect not having existed for a sufficient length of time from which notice thereof could be inferred on the part of the town. Town of Montezuma v. Wilson (Ga.), 9 S. E. Rep. 17. See, also, Philadelphia v. Smith, 23 W. N. C. 242; s. c., 16 Atl. Rep. 493.

⁶ Olson v. Worcester, 142 Mass. 536; Springfield v. Doyle, 76 Ill. 202; Lincoln v. Woodward, 19 Neb. 259; s. c., 27 N. W. Rep. 110; Pomfrey v. Sara-

not be proved where notice may be imputed¹ unless required by statute,² and a statute requiring such actual notice is not unconstitutional as depriving a citizen of his remedy.³

§ 1520. When notice should not be imputed.—Of course notice should not be imputed where the defect has been of very short continuance, as municipal corporations are held only to reasonable care and diligence in search for highway defects,⁴ and particularly where they are concealed by the darkness,⁵ or are in a remote and little frequented part of the city.⁶ And notice of latent defects should not be so readily imputed⁷ as of open and obviously dangerous defects.⁸ Notice

toga Springs, 104 N. Y. 459; *Kunz v. Troy*, 104 N. Y. 344; *Saulsbury v. Ithaca*, 94 N. Y. 27; *Albrittin v. Huntsville*, 60 Ala. 486; *Atlanta v. Champe*, 66 Ga. 659; *Grand Rapids v. Wyman*, 46 Mich. 516.

¹ Where the sidewalk at an intersection of two streets ends in a precipitous descent of some five or six feet, and this condition is permitted to exist for years, it is not incumbent on one injured by such obstruction to prove that the city had actual notice of the defect which caused the injury. *Whitfield v. City of Meridian*, 66 Miss. 570; s. c., 6 So. Rep. 244; *Sterling City v. Merrill*, 124 Ill. 522; *Chicago v. Dalle*, 115 Ill. 386.

² Laws of New York of 1869, title 3, chapter 912, as amended by Laws of 1881, chapter 183, page 227, provides that the city of Cohoes shall not be liable for injury sustained by reason of any street or highway being out of repair, unsafe, or obstructed by snow or ice, unless actual notice of the danger or obstruction be given to the common council or superintendent of streets at least twenty-four hours previous to such damage or in-

jury. It was held that it was not sufficient, in an action against a city for injuries caused by falling on an icy sidewalk, to show that the superintendent of streets knew or should have known of the obstruction by personal observation. *McNally v. Cohoes*, 53 Hun, 202; s. c., 6 N. Y. Supl. 842.

³ *McNally v. Cohoes*, 53 Hun, 202.

⁴ *Sheel v. Appleton*, 49 Wis. 125; s. c., 5 N. W. Rep. 27; *Sikes v. Manchester*, 59 Iowa, 65; s. c., 12 N. W. Rep. 755. Where a contractor engaged in the erection of a building leaves a plank across a sidewalk on quitting work at night, in the absence of actual notice the city is not liable to one who fell over it within one hour and forty-five minutes after the workmen left the building, as such a length of time was not sufficient to charge notice. *City of Warsaw v. Dunlap*, 112 Ind. 576; s. c., 14 N. E. Rep. 568.

⁵ *Klatt v. Milwaukee*, 53 Wis. 196; *Sweet v. Gloverville*, 12 Hun, 302; *Blakely v. Troy*, 18 Hun, 167.

⁶ *Chicago v. McCarty*, 75 Ill. 602. See *Kunz v. Troy*, 104 N. Y. 344.

⁷ In *Hanscom v. Boston*, 141 Mass. 242, it was held that the city was not

⁸ When the defect is a patent one, and has existed five or six weeks, the jury is warranted in finding that the city had notice of it. *Philadelphia v. Smith*, 23 W. N. C. 242; s. c., 16

Atl. Rep. 493. See, also, *Albrittin v. Huntsville*, 60 Ala. 486; *Harriman v. Boston*, 114 Mass. 241; *Kiley v. Kansas City*, 69 Mo. 102.

is readily imputed where the defect is permanent and frequently recurs.¹ Notice of a highway defect is not to be imputed because the highway is so poorly constructed that such a defect is likely to occur in the indefinite future.²

§ 1521. Notice when a question for the jury.— Ordinarily the question whether a municipality or its officers used reasonable diligence to discover a defect is for the jury.³ Where

liable under the public statutes for an injury to a traveler caused by falling into a coal hole in the sidewalk by reason of the cover turning over when he stepped on it because not fastened on the inside by the occupant of the cellar as it was designed to be, if the fact that it was unfastened was not known to any officer of the city, and was not apparent from the street. In *Gubasko v. New York*, 1 N. Y. Supl. 215, plaintiff was injured by the lower portion of a tree standing in a public street falling on him, the upper portion having been cut off some years before. The tree had a hole in it, but its fall was caused by a blow from a heavy truck which was passing, and after its fall was found to be decayed. It was held that if the tree was dangerous, but appeared to be safe to ordinary observation, defendant was not negligent; nor was defendant required to examine the interior of the hole, which was visible from one side of the tree, though thus it would have discovered the decay. See, also, *Wendell v. Troy*, 39 Barb. 329; *Prindle v. Fletcher*, 39 Vt. 255; *West Chester v. Apple*, 35 Penn. St. 284.

¹ *Fleming v. Springfield*, 154 Mass. 520. The fact that about one-half an hour before the accident the person having the use of the coal hole had removed the covering and had neglected to fasten it on the inside on replacing it does not necessarily defeat plaintiff's action, it appearing that

the defect was permanent, and the neglect to fasten the covering habitual on the part of the occupant of the premises. *McGaffigan v. City of Boston*, 149 Mass. 289.

² *Rocheport v. Attleborough*, 154 Mass. 142; *McGaffigan v. Boston*, 149 Mass. 289; *Adams v. Chicopee*, 147 Mass. 440; *Post v. Boston*, 141 Mass. 189.

³ The fact that a sidewalk was inspected by a village officer a few weeks before plaintiff received an injury thereon is no defense to an action for such injury, and it is proper to submit to the jury the question whether the trustees used reasonable diligence in discovering whether the walk was out of repair. *Stebbins v. Village of Oneida*, 5 N. Y. Supl. 488. See, also, *Kunz v. Troy*, 104 N. Y. 344; s. c., 1 N. Y. Supl. 596. In an action for personal injury caused by a hole in the snow which covered a street of defendant to the depth of from one to two feet, it appeared that the street was one on which there was a great amount of traffic; and that, aside from such hole, the street was in good condition. Plaintiff's evidence showed that the hole had been in the same condition for from five to seven days before the accident, and that it was from four to six feet long, from one and one-half to two feet deep, and thirty inches wide, and ran lengthwise of the street. Defendant's witnesses estimated it as smaller. The question whether defendant was

the evidence is conflicting the jury must decide whether notice should be imputed to the city.¹ The court may draw the jury's attention to the facts from which notice of the accident may be inferred.² The facts may be so clear as to exclude any reasonable inference of constructive notice and in such case should not be submitted to the jury.³

§ 1522. Notice from similar accidents.—In order to prove that a highway is defective at the place where plaintiff was

negligent in not discovering and filling the hole before the accident was properly submitted to the jury. *Fitzgerald v. City of Troy*, 7 N. Y. Supl. 103. On the day of the accident about one-tenth of an inch of snow had fallen, and in ten days preceding not more than five-tenths of an inch had fallen. It had thawed in the first portion of this period of ten days. The ice at the place of the accident was rough and uneven, looked like old ice, extended the width of the walk, and had been so a week or ten days. This was held sufficient to justify the jury in finding that the city had constructive notice. *Masters v. Troy*, 50 Hun, 485; s. c., 3 N. Y. Supl. 450. Where there is evidence from which the jury might have found that a defect caused by an accumulation of snow and ice had existed for nine days on a frequented sidewalk, which during that time was patrolled by a policeman, and several times passed by one of the selectmen of defendant town, these facts clearly afford evidence of notice of the defect, and of negligence in not remedying it, for the jury to pass on. *Fortin v. Easthampton*, 145 Mass. 196; s. c., 13 N. E. Rep. 599. A defect had continued several weeks, during which sometimes it became filled with dirt, when it was not conspicuous, and in wet weather it was washed out, and became quite visible. Held sufficient evidence to go to the jury on the question of notice to the municipal authorities. *Schroth v. Pres-*

cott, 68 Wis. 678; s. c., 32 N. W. Rep. 621.

¹ Though a city giving license to a builder to pile building material in the street is entitled to notice of danger therefrom to passers-by, such notice is implied by the open and continuous neglect of the builder; and the fact of this notice, if in doubt, is to be left to the jury. *Magee v. Troy*, 1 N. Y. Supl. 24. When the evidence as to the condition of a sidewalk is conflicting, the question whether or not the condition was such as to impart constructive notice to the city is for the jury. *Troxel v. Vinton*, 77 Iowa, 90; s. c., 41 N. W. Rep. 580.

² There is no error in calling the attention of the jury to the fact that the accident occurred in front of the police station, and within sight of the officers whose duty it was to have charge of the station. *Osborne v. Detroit*, 32 Fed. Rep. 37.

³ In an action against a city for injuries caused by slipping on ice, where the only evidence of the existence of ice prior to the accident is that it snowed on the third day before, rained on the second day before, and froze on the night before, together with the testimony of plaintiff that there was ice there on the night before, no inference of constructive notice can be reasonably made, and the question should not be submitted to the jury. *Davis v. Kingston*, 5 N. Y. Supl. 506.

injured it is competent to show that others have fallen or slipped at the same place.¹ Similar accidents in the same neighborhood may be proved as evidence not only of the actual condition of the highway but as tending to show notice to the municipality.² Thus evidence of the generally defective condition of a bridge or sidewalk is admissible though the injury occurred at a particular place therein.³ In Michigan the notice must relate to the particular defect which caused the injury, and not to a generally defective condition in the vicinage; for instance, a city cannot be held in damages for the non-repair of a crosswalk by showing that the sidewalks in the vicinity were out of repair;⁴ and a similar rule exists in Massachusetts.⁵ The Iowa rule is that notice of defects which had been repaired before the accident is not sufficient, though the defects were at the same place as before,⁶ and qualifiedly in Ohio.⁷

¹ *Masters v. Troy*, 50 Hun, 485; *Quinlan v. Utica*, 11 Hun, 217; *aff'd*, 74 N. Y. 603; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 469.

² *Osborne v. Detroit*, 32 Fed. Rep. 36; *District of Columbia v. Armes*, 107 U. S. 519, where a policeman was allowed to testify that he remembered sending home in a hack a woman who had fallen there, and had seen as many as five persons fall there. See, also, *Chicago v. Powers*, 42 Ill. 169; *Delphi City v. Lowery*, 74 Ind. 520; *Kent v. Town of Lincoln*, 32 Vt. 591; *Augusta v. Hafers*, 61 Ga. 48; *House v. Metcalf*, 27 Conn. 631; *Calkins v. Hartford*, 33 Conn. 57; *Darling v. Westmoreland*, 52 N. H. 401; *Hill v. Portland &c. R. Co.*, 55 Me. 438; *Aurora v. Hellman*, 90 Ill. 61; *Weisenberg v. Appleton*, 26 Wis. 56. In an action for injuries caused by a defective sidewalk, evidence of the defective condition of the walk some distance from the place of injury, and also of its general defective condition, is admissible to show that the village had constructive notice of

the defect. *Shaw v. Village of Sun Prairie*, 74 Wis. 105; s. c., 42 N. W. Rep. 271.

³ *Spearbracker v. Larrabee*, 64 Wis. 573. If a sidewalk is continuously unsafe for a considerable distance, and an accident occurs at one end of such unsafe portion, evidence of the condition of the walk for the whole distance is admissible, in an action against the town, to show that defendant should have known of its condition. *Armstrong v. Ackley*, 71 Iowa, 76; s. c., 32 N. W. Rep. 180. But see *Ruggles v. Nevada*, 63 Iowa, 185.

⁴ *Dundas v. Lansing City*, 75 Mich. 499; *Huntley v. Railroad Co.*, 38 Mich. 540.

⁵ *Collins v. Dorchester*, 6 Cush. 396; *Robinson v. Fitchburg &c. R. Co.*, 7 Gray, 92; *Standish v. Washburn*, 21 Pick. 237; *Maguire v. Middlesex R. Co.*, 115 Mass. 239.

⁶ *Carter v. Monticello*, 68 Iowa, 178.

⁷ In an action against a municipal corporation to charge it with liability to one injured by stepping on a loose

§ 1523. When notice is not necessary.—Where a city has caused a defect by its own act or procurement it is not entitled to any notice of it,¹ for instance, where negligent construction of some highway appurtenance by the municipality is shown.² A city is not entitled to notice of a defect where its ignorance of it is the result of its omission of its duty of supervision,³ as where the defect is caused by the act of a contractor in the city employ⁴ or by the negligence of a city em-

board in a sidewalk, it cannot, as matter of law, be charged with notice of such defect, merely because it had knowledge of the existence of a general defect in the walk, in that it had become dishd through the settling of the middle stringers of the walk. *Village of Shelby v. Clagett* (Ohio), 22 N. E. Rep. 407.

¹ *Houston v. Isaacs*, 68 Tex. 116; *Springfield v. Le Claire*, 49 Ill. 476; *Birmingham v. McCary*, 84 Ala. 469; *Brusso v. Buffalo*, 90 N. Y. 679; *Russell v. Columbia*, 74 Mo. 480; *Stephens v. Macon*, 83 Mo. 345; *Austin City v. Ritz*, 72 Tex. 391. In *Barr v. Kansas City*, 105 Mo. 550, the court said: — "The hole could have been re-covered within the hour of the discovery of its condition. Besides the displacement was not the result of an accident or the wrongful act of another, but the natural consequence of defects in its original construction by the city, of which it was charged with notice from the beginning and which it was under a continuing duty to repair." See, also, *Russell v. Columbia*, 74 Mo. 480; *Klein v. Dallas*, 71 Tex. 280; s. c., 8 S. W. Rep. 91; *Montgomery v. Des Moines*, 55 Iowa, 101; s. c., 7 N. W. Rep. 421.

² The declaration containing counts charging active malfeasance by negligence in the construction and restoration of an apron over a ditch, proof of notice to defendant of the defect is unnecessary, as it was bound to

take notice that the improvement was itself dangerous; and hence it is not error to refuse to give instructions, not limited to any particular counts, which make such notice essential to recovery. *Village of Jefferson v. Chapman*, 127 Ill. 438; s. c., 20 N. E. Rep. 33. See, also, *Crawfordsville v. Bond*, 96 Ind. 236; *Hiller v. Sharon Springs*, 28 Hun, 344. Where there is no evidence either as to the manner of the construction of the crossing, or the quality of the material used, or the length of time since its construction, it is error to instruct the jury that, if the defect was the result of defective construction originally, the city would be chargeable without any notice of such defect. *Stein v. City of Council Bluffs*, 72 Iowa, 180; s. c., 33 N. W. Rep. 455.

³ *Boucher v. New Haven*, 40 Conn. 456; *Manchester v. Hartford*, 30 Conn. 118.

⁴ A provision of a city charter that, in order to render the city liable for "gross negligence" in non-repair of a street, the non-repair must have been continued for ten days after notice in writing given to certain officials, does not apply to a case where the city itself had an excavation dug by a contractor, discharged the contractor, and left the excavation as it was. *Houston v. Isaacs*, 66 Tex. 116; s. c., 3 S. W. Rep. 693. See, also, *Brooks v. Somerville*, 106 Mass. 271; *Wendell v. Troy*, 4 Abb. App. Dec. 563.

ployee.¹ If a municipal corporation causes work to be done which is in its nature dangerous to the public, it is bound to take notice of the character of the work and of the condition in which it is left.² The statutes may dispense with the necessity of a notice by imposing an absolute liability on municipalities for neglecting repairs.³

§ 1524. Notice to officers, etc.—Notice of a highway defect to any municipal officer or agent having any duty to perform in respect to highway repairs is notice to the municipality; for instance, to an alderman as a member of the common council;⁴ and actual knowledge of such an officer is

¹ The provision of the charter of Oshkosh that the city shall not be liable for damages arising from defective streets, sidewalks, sewers, etc., unless before the accident an alderman of the ward knew of the defect, does not apply to the case of a horse injured by running at night into a pile of gravel and stones left in the street by an employee of the city while repairing the street. *Adams v. City of Oshkosh*, 71 Wis. 49; s. c., 36 N. W. Rep. 614. Plaintiff, while driving in defendant city, was injured through his horse taking fright at a large wooden roller which had been used in the care of the streets, and left standing therein by the servants of defendant. It was held that the defendant was liable for the nuisance, without regard to whether notice of the injury had been given as required by its charter, which provides that no action shall be maintained against the city for injuries caused by any defect in the condition of the street unless notice in writing, signed by the injured party, shall have been given to the proper persons within five days of the injury. *Hughes v. City of Fond du Lac*, 73 Wis. 380; s. c., 41 N. W. Rep. 407.

² *Jefferson Village v. Chapman*, 127

Ill. 438, 447; *Chicago v. Brophy*, 79 Ill. 277; *Chicago v. Johnson*, 53 Ill. 91; *Springfield v. Le Claire*, 49 Ill. 476.

³ Code of West Virginia, chapter 43, section 53, imposes an absolute liability on towns for injuries caused by the failure of the authorities to keep in repair those sidewalks within the corporate limits which they have opened and treated as public sidewalks, and a person injured by a defective sidewalk need not allege or prove that defendant had notice of the defect. *Chapman v. Town of Milton*, 31 West Va. 384; s. c., 7 S. E. Rep. 22.

⁴ *Dundas v. Lansing*, 75 Mich. 499; *Carter v. Monticello*, 68 Iowa, 178; *Logansport v. Justice*, 74 Ind. 378; *Aurora v. Hellman*, 90 Ill. 61; *Trapnell v. Red Oak Junction*, 39 N. W. Rep. 884. But as to a latent defect, see *Vanderslice v. Philadelphia*, 103 Penn. St. 102. It is admissible for plaintiff to prove that one of the aldermen of the city had notice of the defect in the crosswalk before the accident happened, as notice to one of the aldermen is notice to the city council, which body, under the city's charter, is invested with control of the streets. *McKeigue v. City of Janesville*, 68 Wis. 50; s. c., 31 N. W.

actual notice to the city.¹ Under the application of this rule notice to a policeman has been held sufficient,² and to street commissioners,³ and to road overseers,⁴ and to street superintendents.⁵ And entries in books kept by the city and its departments to receive complaints of defective streets may be sufficient notice to the city.⁶ In determining whether municipal officers should have discovered a defect the jury may consider the fact that others did not notice it.⁷

§ 1525. Notice of injury.—Where a person is excused from giving the required statutory notice of an injury because it is impossible to do so from any physical or mental incapacity, the burden is upon such person to prove the existence of such incapacity, and proof of such physical and mental disorder as

Rep. 298. Notice to a city marshal of a defect in a sidewalk is not notice to the city, the marshal being clothed with no power and charged with no duty in the premises. *Cook v. Anamosa*, 66 Iowa, 427.

¹ The provision in a charter that the city shall not be liable for damages by reason of dangerous excavations, etc., without actual notice to one of the city officials three days before the accident, does not relieve the city from responsibility for the neglect of an alderman to erect a barrier on seeing the excavation and having actual knowledge of its dangerous character. *Cantwell v. City of Appleton*, 71 Wis. 463; s. c., 37 N. W. Rep. 813; *Fleming v. Springfield*, 154 Mass. 520.

² *Rehberg v. New York*, 91 N. Y. 137; *Twogood v. New York*, 102 N. Y. 216. By virtue of the ordinance of the city of Denver prescribing the duties of the chief of police, he is charged with the care of coal-holes and caps on the sidewalks of that city; and where he had knowledge of a defect existing in a cap, and owing to such defect an accident subsequently happened, the city should be charged with actual notice

and be liable if there had been time before the accident reasonably sufficient to remedy the defect. *City of Denver v. Deane*, 10 Colo. 375; s. c., 16 Pac. Rep. 30. On the question of the liability of a city for an accident caused by an obstruction in a street, evidence that it was the duty of the police to report obstructions is admissible. *Bowman v. Tripp*, 14 R. I. 242.

³ *Scranton v. Cateson*, 94 Penn. St. 202.

⁴ *Parish v. Eden*, 62 Wis. 272; *Osborne v. Hamilton*, 29 Kan. 1.

⁵ *Fleming v. Springfield*, 154 Mass. 520.

⁶ In an action against a city for injuries received by reason of a defect in the highway, a book kept in the office of the city messenger for the purpose of entering complaints as to the condition of the streets, sidewalks, etc., and recording the time when such complaints were attended to, is admissible to show notice to the city of the defect. *Blake v. Lowell*, 145 Mass. 296; s. c., 9 N. E. Rep. 627.

⁷ *Broberg v. Des Moines*, 63 Iowa, 523. See *Grand Rapids v. Wyman*, 46 Mich. 516.

merely confines him to his bed is not sufficient,¹ because such notice may be given through another person, and is in the nature of a condition precedent where the giving of it is not shown to be impossible.² Where, as in Wisconsin, the statute makes service of notice, etc., a prerequisite to the maintenance of a suit against a town or city to recover for injuries sustained from a defect in a highway, service of the notice is indispensable, and the complaint must aver it.³ Where the time of the service of a notice, not its date, is the essential thing, it may be received in evidence with such explanations as can be given, although the date appears to have been altered.⁴ The question of the sufficiency of the notice is matter of law for the court.⁵ Notice of an injury sustained on a bridge to one of the several towns by which the bridge was jointly built is sufficient to bind all.⁶

§ 1526. The same subject continued — Requisites of notice.— Inaccuracy in stating the cause of injury is not fatal unless it is misleading and in fact misleads.⁷ A notice of in-

¹ Public Statutes of Massachusetts, chapter 53, sections 19, 21, require a person injured by a defect in a sidewalk to give notice to the city within thirty days, in writing, signed by himself, or some one in his behalf; but "if, from any physical or mental incapacity, it is impossible for the person injured to give the notice" within the time provided, he may give the same within ten days after such incapacity is removed. Plaintiff failed to give the notice until about three months after the injury, and the evidence showed that she had been confined to her bed; that her head had troubled her since the injury; that at times she had been dizzy, and her mind visionary; that for the first six weeks she was at times delirious in the night-time; that she appeared worse after opiates were given her by the physician's directions; and that she complained of her head frequently. These facts

were held insufficient to show that it was impossible for her, from "physical or mental incapacity," to have given the notice. *May v. Boston*, 150 Mass. 516; s. c., 23 N. E. Rep. 220; *Mitchell v. Worcester*, 129 Mass. 525; *McNulty v. Cambridge*, 130 Mass. 275; *Lyons v. Cambridge*, 132 Mass. 534.

² *Mitchell v. Worcester*, 129 Mass. 525; *Kennedy v. Lawrence*, 128 Mass. 318; *Gay v. Cambridge*, 128 Mass. 387; *Larkin v. Boston*, 128 Mass. 521. A husband may serve the notice for his injured wife. *Smalley v. Appleton*, 75 Wis. 18.

³ *Wentworth v. Summit*, 60 Wis. 281; *Dorsey v. Racine*, 60 Wis. 292.

⁴ *Spearbracker v. Larrabee*, 64 Wis. 573.

⁵ *Chapman v. Nobleboro*, 76 Me. 427.

⁶ *Tyler v. Williston*, 62 Vt. 269.

⁷ Public Statutes of Massachusetts, chapter 52, section 19, provide that persons injured by defects in the ways

jury and claim is not fatally defective because it imperfectly or incorrectly designates the place of the injury.¹

§ 1527. The same subject continued—Illustrations of sufficient notice.—The statutory notice of the nature and place of the injury is sufficient if given in general terms that cannot

of cities or towns shall within thirty days thereafter give notice of the time, place and cause of the injury. It was held that, under act of Massachusetts of 1882, chapter 36, such notice will not be insufficient for any inaccuracy in stating the cause of the injury if there was no intention to mislead, and the town was not in fact misled; and it is for the jury to find whether the notice was misleading or not. *Liffin v. Town of Beverly*, 145 Mass. 549; s. c., 14 N. E. Rep. 787; *Canterbury v. Boston*, 141 Mass. 215. See, also, § 771, *supra*. A notice sufficiently states the cause of the injury which states that it occurred by reason of a pile of timber and a pile of hay, although the timber alone constituted the defect in the way. *Davis v. Charlton*, 140 Mass. 422. If a person steps into a drain running across the sidewalk of a street in a city, and stumbling falls over an embankment by the side of the street, which is unprotected by a railing, into an adjacent sewer, and is injured, a notice to the city stating the lack of a railing as the cause of his injury is sufficient. *Grogan v. Worcester*, 140 Mass. 227.

city of Minneapolis, stated that plaintiff, "while passing over a sidewalk upon the south side of T. street, between F. and S. avenues, . . . at a point near the intersection of said T. street and said S. avenue, . . . fell," etc. T. street crossed F. avenue, but did not go through to S. avenue, terminating at B. avenue within one block of S. avenue. The defect complained of was upon T. street, but between F. and B. avenues. It was held that the notice sufficiently designated the place where the injury was received. *Harder v. City of Minneapolis*, 40 Minn. 446; s. c., 42 N. W. Rep. 350. The court said:—"In *Nichols v. Minneapolis*, 30 Minn. 545, the manifest object of the provision of the charter now being considered was declared to be that the city might have timely notice of any claim made upon it, and thus be enabled to ascertain the facts to establish them while witnesses are obtainable, and the occurrence and the condition of the place at the time fresh in their recollection. It is obvious then that a notice which informs the proper authorities of the place with a reasonable certainty, and so that it can be found with reasonable diligence, is sufficient. And a notice of this character ought not to be construed with technical strictness. It is enough if it gives to the officer upon whom it must be served information with substantial certainty as to the place of injury, so as to be of aid to him in investigating the question of the liability of the

¹ A difference of sixty-five feet between the place of the accident, as proved, and the place as stated in the claim filed by plaintiff, is immaterial. *Masters v. Troy*, 50 Hun, 485; s. c., 3 N. Y. Supp. 450. In an action for personal injuries occasioned by a defect in a sidewalk the notice given by the plaintiff, as required by section 20, chapter 8, of the charter of the

be misunderstood. Technical terms and an accurate description in detail are not necessary.¹ The notice required by statute of the place of an accident is sufficiently specific if it describes a large hole in the planking of a bridge, although there are two smaller holes near by.² Where a defect at the corner of two ways is minutely described in the notice required, the notice will not be deemed defective merely because it fails to specify the particular corner.³ Nor is a notice defective because addressed personally to a municipal officer, if it is apparent that it was intended for the municipality.⁴ A notice to a city of the place where an accident occurred which equally well describes two distinct localities, and can only be located by a description of ice which was there eight days before the notice was given, is insufficient.⁵ A notice which merely states that the injury "was caused by an obstruction in the highway" is not sufficiently explicit.⁶

§ 1528. Pleading of notice — Evidence of. — A complaint that a certain street formed a highway through a city, that it was badly out of repair, that the city had allowed a large ditch to be washed out on one side, and that plaintiff, being in ignorance of the ditch, and the city knowing said highway to be out of repair, was injured by driving into said ditch, was

municipality. *Spellman v. Chicopee*, 131 Mass. 443. And when it conveys the necessary information to the proper person it is good even though there are some inaccuracies in it. *La Crosse City v. Town of Melrose*, 22 Wis. 459." See, also, *Lowe v. Clinton*, 133 Mass. 526; *Welch v. Gardner*, 133 Mass. 529; *McCabe v. Cambridge*, 134 Mass. 484; *Lyman v. Hampshire County*, 138 Mass. 74; *Fopper v. Town of Wheatland*, 59 Wis. 623.

¹ *Brown v. Southbury*, 53 Conn. 212.

² *Lyman v. Hampshire County*, 138 Mass. 74.

³ *Sargent v. Lynn*, 138 Mass. 599. A notice to a town described a defect in a way to be "the improper grading of the said road, and the want of proper railing by the side of said

road." Held, that it could not be ruled, as matter of law, that notice of an improper declivity of a gutter at the roadside was not embraced in the notice given. *Spooner v. Freetown*, 139 Mass. 235. The notice required to be given to a city as the foundation of an action to recover for injuries from a defective way may sufficiently locate the spot of the accident, even though the spot is described as being on the wrong side of the street, if from the rest of the description it is apparent that no misunderstanding could have resulted. *Cloughessey v. Waterbury*, 51 Conn. 405.

⁴ *Leonard v. Holyoke*, 138 Mass. 78.

⁵ *Dalton v. Salem*, 139 Mass. 91.

⁶ *Roberts v. Douglas*, 140 Mass. 139.

held, after verdict, to be a sufficient allegation of notice by the city.¹ A complaint against a city for negligently leaving an obstruction in its streets must allege that the city had notice of the obstruction, or ought to have had,² or must state facts from which such notice may be fairly inferred;³ and for want of such allegation of notice the complaint will be demurrable.⁴ Where the defective condition of a highway or bridge is not caused by the wrongful act of another, but arises from the fault of the corporation or county, or from decay or inherent insufficiency of the work, it is sufficient in the complaint to charge the negligence or omission complained of, and no averment of notice is necessary.⁵ Subsequent repair is not evidence of prior notice of the defect.⁶ The fact that a street commissioner was informed that there was a defect on a certain street, together with the presumption that he did his duty in going to look, will warrant a jury in finding that he had actual notice.⁷ As to defects caused by the acts of a city or village itself it is not necessary to prove either actual or constructive notice.⁸

¹ *Madison v. Baker*, 103 Ind. 41; See, also, *South Bend v. Paxon*, Bluffton *v. Mathews*, 92 Ind. 213; 67 Ind. 228; *Indianapolis v. Scott*, Turner *v. Indianapolis*, 96 Ind. 51. 72 Ind. 196; *Board v. Brown*, 89

² *Turner v. Indianapolis*, 96 Ind. 51. Ind. 48; *Board v. Emmerson*, 95 Ind. 579.

³ *Lafayette City v. Blood*, 40 Ind. 62; *Higert v. Greencastle City*, 48 Ind. 574; *Fort Wayne v. De Witt*, 47 Ind. 391; *Elkhart v. Ritter*, 66 Ind. 136.

⁴ If the complaint, in an action against a town to recover damages sustained from a defect in a sidewalk, fails to aver notice on the part of the town of the existence of the defect, or facts imputing notice, it is demurrable. *Spiceland v. Alier*, 98 Ind. 467; *Worster v. Canal Bridge*, 16 Pick. 541; *Fort Wayne v. De Witt*, 47 Ind. 391.

⁵ In an action against a county for its negligence in suffering the timbers of a bridge to become rotten, whereby plaintiff was injured, notice to defendant of the condition of the bridge need not be alleged. *Allen County v. Bacon*, 96 Ind. 31.

⁶ The fact that immediately after an accident caused by a defective sidewalk the city removed it and substituted a better one, is relevant as tending to show that the walk was out of repair, but not that the city had notice. *Emporia v. Schmidling*, 33 Kan. 485.

⁷ *Welch v. Portland*, 77 Me. 384. Evidence of the condition of the sidewalk where plaintiff was injured and of similar accidents occurring there previously is admissible to show notice on the part of defendant. *Stebbins v. Village of Oneida*, 5 N. Y. Supl. 483; § 1522, *supra*.

⁸ *Riddle v. Westfield Village*, 65 Hun, 432; *Turner v. Newburgh*, 109 N. Y. 432; § 1523, *supra*.

§ 1529. **Preliminary presentment of claim.**—In the absence of a statute, a claim against a town for damages for injuries sustained from a defect in a sidewalk need not be made before bringing suit.¹ The statute may make such presentment a condition precedent,² or only a condition subsequent, or the statute may be only directory. In each case the terms of the statute must be clearly distinguished;³ and a substantial compliance with the statute is ordinarily sufficient.⁴

§ 1530. **Evidence of specific defect.**—Plaintiff must prove the existence of the specific defect alleged in the complaint;⁵ in a given case he may do so by proving that the way was continuously defective;⁶ but not where the defect was clearly not continuous, as, for instance, a single loose board of a side-

¹ *Green v. Spencer*, 67 Iowa, 410. See, also, *Spencer Tp. v. Riverton Tp.*, 56 Iowa, 85; *Lane v. Woodbury Tp.*, 58 Iowa, 462.

² Where a city charter, like that of Buffalo, requires that "all claims against the city" shall be presented for audit, a claim for injuries sustained from a defect in a street must be so presented before suit. *Nagel v. Buffalo*, 34 Hun, 1; *Merrick v. Troy*, 19 Hun, 253; s. c., 83 N. Y. 514.

³ *McGaffin v. Cohoes*, 11 Hun, 531; s. c., 74 N. Y. 387; *Quinlan v. Utica*, 11 Hun, 217; *Childs v. West Troy*, 23 Hun, 68.

⁴ A statutory requirement that a claim against a city shall be "presented to the common council for audit" is complied with by a presentation to the clerk of the common council. *Murphy v. Buffalo*, 38 Hun, 49.

⁵ *Armstrong v. Town of Ackley*, 71 Iowa, 76. Testimony to a fall upon the same walk from a defect in it, by one who is unable to state the exact place of the defect, is altogether inadmissible, and it is error to admit it, so far as it relates to the point at which the accident com-

plained of occurred. *Hoyt v. City of Des Moines*, 76 Iowa, 430; s. c., 41 N. W. Rep. 63. In an action for personal injuries a witness was asked: "Don't you know as a fact that this sidewalk was fixed in March, 1887?" Held, that the question was objectionable, as it did not appear to refer to a repairing of the defect alleged by plaintiff, and therefore did not tend to show what was the condition of the sidewalk at the time of the accident, in February, 1887. *Hillesum v. City of New York*, 56 N. Y. Super. Ct. 596; s. c., 4 N. Y. Supl. 806. In an action for injuries by slipping on an icy sidewalk, plaintiff may show that at about the same time other persons slipped and fell at the same place. *Masters v. City of Troy*, 50 Hun, 485; s. c., 3 N. Y. Supl. 450. In an action against a city for personal injuries caused by falling into a hole in a sidewalk, evidence that another fell into the same hole on the same night is inadmissible. *Moore v. City of Richmond*, 85 Va. 538; s. c., 8 S. E. Rep. 387.

⁶ *Moore v. City of Richmond*, 85 Va. 538; s. c., 8 S. E. Rep. 387.

walk.¹ Where there is no evidence of an intervening change in the *locus in quo* the court may in its discretion allow evidence of a prior or later condition of the place of accident.²

§ 1531. Subsequent repairs as evidence.—Evidence of repairs immediately subsequent to an accident is admissible to show the existence of a defect which the city ought to repair,³ and to show that the city exercised authority and control over the *locus in quo*;⁴ but not for the purpose of showing that the city was negligent, as negligence would depend also on notice to the city.⁵ As Baron Bramwell said:—"People

¹Ruggles v. Town of Nevada, 63 Iowa, 185. In an action for injuries occasioned by a defective crossing, testimony tending to show generally the defective condition of the sidewalk a block or more each way from the crossing was inadmissible. Dundas v. City of Lansing, 75 Mich. 499; s. c., 42 N. W. Rep. 1011.

²In an action against a municipal corporation for injuries received from a fall on an icy sidewalk, evidence of the icy condition of the sidewalk a week before the accident is properly rejected, in the discretion of the presiding judge. Woodcock v. Worcester, 138 Mass. 268. In an action against a city for a personal injury sustained by falling on an icy sidewalk, evidence is competent to show the like condition of the sidewalk nineteen days later, and the height, slope and surface of an adjacent field, at a point twenty-five feet distant, there being no evidence of any intermediate change. Berrenberg v. Boston, 137 Mass. 231; s. c., 50 Am. Rep. 296; Stone v. Hubbards-ton, 100 Mass. 49; Fitzgerald v. Woburn, 109 Mass. 204. In an action against a city for injuries received from a defective sidewalk, testimony of the condition of the walk after the accident is inadmissible, in the absence of evidence that its condition

was the same at the time of the accident. Hoyt v. City of Des Moines, 76 Iowa, 430; s. c., 41 N. W. Rep. 63.

³Brennan v. St. Louis, 92 Mo. 482; Mitchell v. Plattsburg, 33 Mo. App. 555; Goshen v. England, 119 Ind. 368; Dale v. Delaware R. Co., 73 N. Y. 468, 472; Emporia v. Schmidling, 33 Kan. 485.

⁴Sewell v. Cohoes, 75 N. Y. 45, distinguishing Dougan v. Champlain Trans. Co., 56 N. Y. 1.

⁵Columbia R. Co. v. Hawthorne, 144 U. S. 202; Brennan v. St. Louis, 92 Mo. 482, 488. See Nally v. Carpet Co., 51 Conn. 524; Morse v. Minneapolis R. Co., 30 Minn. 465, where O'Leary v. Mankato City, 21 Minn. 65; Phelps v. Mankato City, 23 Minn. 276, and Kelly v. Railroad Co., 28 Minn. 98, are explained and limited. See, also, Baird v. Daily, 68 N. Y. 547; Corcoran v. Peekskill, 108 N. Y. 151; Ely v. St. Louis R. Co., 77 Mo. 34; Missouri Pacific Ry. Co. v. Hennessey, 75 Tex. 155; Terre Haute R. Co. v. Clem, 123 Ind. 15; Hodges v. Percival, 132 Ill. 53; Lombar v. East Tawas, 86 Mich. 14; Shinnors v. Proprietors &c., 154 Mass. 168. Evidence that after the accident the sidewalk commissioner stated that he had given notice to repair the walk is inadmissible, where it does not appear whether the notice was given before

do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before."¹ In some States the subsequent conduct of a common carrier may be proved if it tends to show an admission of negligence;² but such subsequent act should follow at once, and not be in fact an ordinary betterment having no particular reference to the accident.³

§ 1532. Evidence of contributory negligence.—To prove contributory negligence in a case of injury on the highway, evidence of plaintiff's physical infirmities is admissible;⁴ and of his intoxication at the time;⁵ and evidence of an ordinance against fast driving.⁶

or after the accident, or where the officer is not shown to have been acting in the discharge of his official duty when making the statement. *Hoyt v. Des Moines*, 76 Iowa, 430; s. c., 41 N. W. Rep. 63.

¹ *Hart v. Lancashire R. Co.*, 21 L. T. (N. S.) 261, 263.

² *Martin v. Towle*, 58 N. H. 31. In *West Chester R. Co. v. McElwee*, 67 Pa. St. 311, in an action for death by negligence from cars striking a cart which was on scales near to a railroad track, it was held to be proper to show that after the accident the track was removed to a greater distance, the court saying:—"If the proximity of the track to the buildings did not increase the danger, why was it moved? And if it did, then a higher degree of care was necessary in order to avoid accident; and in this respect the evidence was properly received." See, also, *McKee v. Bidwell*, 74 Pa. St. 218; *Pennsylvania Co. v. Henderson*, 51 Pa. St. 315; *St. Louis R. Co. v. Weaver*, 35 Kan. 412.

³ *Dale v. Delaware R. Co.*, 73 N. Y. 468, 472.

⁴ In an action for injuries caused by a defective street crossing, evidence that plaintiff was short-sighted and wore spectacles is admissible as bearing on his contributory negligence in attempting to cross the defective crossing. *City of Austin v. Ritz*, 72 Tex. 391; s. c., 9 S. W. Rep. 884.

⁵ Code of Iowa, section 2704, provides that "under a denial of an allegation, no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove." In an action for personal injuries received by reason of defects in a street, it being incumbent on plaintiff to prove that he was free from contributory negligence, evidence was held to be admissible that at the time of the accident plaintiff was intoxicated. *Fernbach v. City of Waterloo*, 76 Iowa, 598; s. c., 41 N. W. Rep. 370.

⁶ An ordinance of the city is admissible which makes immoderate driving in any street of the city, unless in case of urgent necessity, a

§ 1533. **Instructions to jury** — May supplement each other.— A general and imperfect instruction to the jury may be so supplemented by another instruction as to be neither erroneous nor impertinent; for instance, as to the municipal duty of reasonable care and repair,¹ and as to plaintiff's duty of due care,² and as to the element of notice.³ One instruction must not, however, be construed with another if the effect will be calculated to confuse or mislead the jury.⁴ An instruction as to notice must be correct in its theory; that is, as to whether no notice was required or constructive notice was required;⁵ and must not be obscure and mislead

misdemeanor, though no evidence of immoderate driving has been introduced. *Fernbach v. Waterloo*, 76 Iowa, 598, overruling s. c., 34 N. W. Rep. 610.

¹ An instruction that "the city is not an insurer of the safety of persons traveling upon its sidewalks," followed by the true rule as to the city's liability, is not impertinent and uncalled for. *Lindsay v. Des Moines*, 74 Iowa, 111; s. c., 37 N. W. Rep. 9. The failure in one instruction to qualify "repair" by the word "reasonable," in speaking of the duty of a municipal corporation "to maintain and keep in repair its sidewalks," is without prejudice where in other instructions the liability is expressly limited to the failure to exercise ordinary care and prudence. *Village of Mansfield v. Moore*, 124 Ill. 133; s. c., 16 N. E. Rep. 246.

² Where, in an action against a city to recover damages for personal injuries caused by a defective sidewalk, the court has instructed the jury as to the care which must have been exercised by the plaintiff to entitle him to a recovery, an instruction, the sole purpose of which is to tell the jury what the elements of damages are, and which should be taken into consideration by them in the event of finding the city guilty of negligence, is not objectionable for

failing to contain a hypothesis of due care on the part of the plaintiff. *Village of Sheridan v. Hibbard*, 119 Ill. 307; s. c., 9 N. E. Rep. 901.

³ The failure to mention the element of notice to defendant in one instruction is without prejudice where the correct rule of notice is given in other instructions. *Village of Mansfield v. Moore*, 124 Ill. 133; s. c., 16 N. E. Rep. 246.

⁴ An instruction that, if plaintiff was injured owing to the negligence of the defendant in not removing an obstruction on its sidewalk which plaintiff may have proven was there, the jury may find for plaintiff, is erroneous, in that it does not require them to find that plaintiff was using ordinary care in walking on such sidewalk; and the fact that the law on the subject was correctly given in another instruction is not material, as it cannot be known by which instruction the jury was governed. *City of Boulder v. Niles*, 9 Colo. 415; s. c., 12 Pac. Rep. 632.

⁵ In an action for injuries sustained from the negligent construction of a sidewalk and ditch in a street, an instruction that plaintiff cannot recover unless defendant had notice of the defective and dangerous condition of the sidewalk and ditch, without further instruction as to the law of actual and constructive notice,

ing.¹ But an untechnical and involved instruction is not necessarily misleading.² A party cannot object to an instruction given in the words of his request.³

§ 1534. Correct instructions as to negligence illustrated.

An instruction which requires the jury to find that plaintiff exercised ordinary care, and that defendant's negligence in the

and without qualification as to the possible finding that the city built the walk and ditch, is error. *Klein v. City of Dallas*, 71 Tex. 380; s. c., 8 S. W. Rep. 90. In an action against a city for injuries, a charge that if the jury should find "an open ditch cut by the city," etc., is not erroneous as assuming that the city cut the ditch. *City of Austin v. Ritz*, 72 Tex. 391; s. c., 9 S. W. Rep. 884. It is error to submit a case to the jury on the theory that the defective condition of the sidewalk for more than four weeks was the direct and proximate cause of the accident, when it appears that the defect which caused the injury was a loose plank, put down but a few hours before the accident, before which time there had been no passable sidewalk for more than four weeks; it not appearing that the city officials had notice of the defect which caused the injury. *Hiner v. City of Fond du Lac*, 71 Wis. 74; s. c., 36 N. W. Rep. 632.

¹ An instruction that if "the sidewalk in question was repaired and placed in good condition by the city, within a reasonable time prior to this alleged accident, and if said walk afterwards became out of repair without actual notice to the city, then plaintiff cannot recover," is properly refused, as obscure and misleading, since actual notice by the city of the defect is not essential to plaintiff's recovery if the defect had existed for such a time that the city officers, by the use of reasonable dili-

gence, might have discovered it before the accident. *City of Sterling v. Merrill*, 124 Ill. 522; s. c., 17 N. E. Rep. 6. In an action against a city for injuries, there being evidence to justify a finding either way as to whether a street on which an accident occurred had been opened and worked for public travel by authority of the city, it is error to refuse to charge that the opening and widening of streets is a matter of discretion, and that the city would not be responsible for the condition of the street until opened, though the street was named in the city ordinances. *City of Austin v. Ritz*, 72 Tex. 391; s. c., 9 S. W. Rep. 884.

² An instruction to the jury that they were to find whether the sidewalk at the place where the plaintiff was injured was in an "unreasonably dangerous" condition is not misleading. *Lindsay v. City of Des Moines*, 74 Iowa, 111; s. c., 37 N. W. Rep. 9.

³ At the trial of an action involving the question of the existence of a public way by prescription, a general instruction that the use must be by the public, adverse and under a claim of right, and not permissive, and must be continuous and uninterrupted, was given in the words of plaintiff's prayer for instructions. It was held that they could not object that other instructions did not give sufficient effect to the acts of the land-owners, negating acquiescence on their part. *Weld v. Brooks*, 152 Mass. 297; s. c., 25 N. E. Rep. 719.

construction or maintenance of the sidewalk produced the injury, properly states the rule of negligence.¹ It is enough that an instruction as to contributory negligence requires ordinary care and prudence of plaintiff;² and it is not error to refuse to repeat it or to refuse to give it in the form requested.³

§ 1535. Interest on damages for injuries.—The English statutory rule in actions of trover and trespass that interest on

¹ *Village of Mansfield v. Moore*, 124 Ill. 133; s. c., 16 N. E. Rep. 246; *Steel Co. v. Martin*, 115 Ill. 358.

² An instruction that if plaintiff knew of the defect, and knew that it was dangerous to go upon the walk at night, and there was another way he might have taken, but, with this knowledge, persisted in going upon the street, he would be guilty of contributory negligence; but if, knowing the defect, he reasonably believed that it was not imprudent to go upon the walk, and had the right as a reasonably prudent man to so believe, his going upon the walk would not be negligence, and if, after going on the walk, he used such care as an ordinarily prudent man would under the circumstances, and met with the accident through defendant's negligence, he is entitled to recover for the injury sustained; but if he did not use such care, he is not entitled to recover, although defendant was negligent, is correct. *Kendall v. City of Albia*, 73 Iowa, 241; s. c., 34 N. W. Rep. 883.

³ Where, in an action for injuries received at a defective street crossing, the court defines reasonable care, and instructs the jury that if from the injured person's knowledge of the condition of the locality, the length of time such condition had existed, the nearness or remoteness of other proper approaches available, and all other facts and circumstances

proven, they find contributory negligence, plaintiff cannot recover, although defendant was negligent as alleged, it is not error to refuse an instruction that the injured person's knowledge of the condition of the crossing, and that it was dangerous, will not prevent a recovery, if she used proper care. *Larsh v. City of Des Moines* (Iowa), 38 N. W. Rep. 384. Plaintiff asked instructions that "the fact that she knew that a ridge of ice, dangerous in its character, existed at the place of injury, did not conclusively prove negligence on her part in attempting to pass over it; and that, if she had reasonable cause to believe that she could pass in safety over it, and used reasonable care in the attempt, she might recover; and that she was not bound, as a matter of law, to have her attention directed, at the moment of danger, to the alleged defect." These were not given, and, while plaintiff's counsel was making his closing argument, the court stated that, if a person knows a way to be dangerous when he enters on it, he cannot, with ordinary prudence, proceed and take his chances, and, if injured, look to the town for indemnity; but in charging the jury the court left to them the whole question of what was due care, under all the circumstances, and whether plaintiff exercised such care. This was held no error. *Parker v. City of Springfield*, 147 Mass. 391;

damages should be left to the discretion of the jury was formerly followed in the State of New York,¹ but was abandoned on the ground that interest in such cases is as necessary a part of a complete indemnity as the value itself, and therefore in fixing the damages interest should no more be left to the jury's discretion than the value, but should be allowed on the damages awarded as matter of law.² It has recently been decided in New York by a divided court that interest on damages in cases of highway injury should be left to the discretion of the jury.³

§ 1536. Contributory negligence — Knowledge of danger.

While a person's knowledge of the dangerous condition of a street or of a dangerous place therein generally imposes upon him a corresponding duty of care and caution in passing through or over or near it,⁴ yet he is not negligent, as matter

s. c., 18 N. E. Rep. 70; *Howes v. Grush*, 131 Mass. 207; *Deerfield v. Conn. River R. Co.*, 144 Mass. 325.

¹ *Beals v. Guernsey*, 8 Johns. 446; *Hyde v. Stone*, 7 Wend. 354; *Bissell v. Hopkins*, 4 Cow. 58; *Rowley v. Gibbs*, 14 Johns. 385.

² *Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Railroad Co.*, 49 N. Y. 315; *Turnpike Co. v. Buffalo*, 58 N. Y. 639; *Parrott v. Ice Co.*, 46 N. Y. 369.

³ *Wilson v. Troy* (Oct., 1892), 46 Alb. L. J. 518, where O'Brien, J., in speaking for the majority of the court, said:—"It is difficult to perceive any sound distinction between a case where the defendant converts or carries away the plaintiff's horse, and a case where through negligence on his part the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other. In an early case in this State the principle was recognized that interest might be allowed by way of damages upon the sum lost by the plaintiff in consequence of defendant's negligence. *Thomas v. Weed*, 14 Johns. 255. We

think the rule is now settled in this State that where the value of property is diminished by an injury wrongfully inflicted the jury may in their discretion give interest on the amount by which the value is diminished from the time of the injury. That is the rule laid down in the elementary books and sustained by the adjudged cases. 1 Sedgwick on Damages (8th ed.), §§ 317, 320; *Walrath v. Redfield*, 18 N. Y. 457, 462; *Mairs v. Association*, 89 N. Y. 498; *Duryee v. Mayor &c.*, 96 N. Y. 477, 499; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun, 182, 188; *Moore v. Railroad Co.*, 126 N. Y. 671; *Railroad Co. v. Ziemer*, 124 Penn. St. 560."

⁴ *Palmer v. Dearing*, 93 N. Y. 7, 10; *Gordon v. Richmond*, 2 S. E. Rep. 727; *Fort Wayne v. Breese*, 23 N. E. Rep. 1038; *Moore v. Huntington*, 31 West Va. 842, 843; *Beach on Contributory Negligence* (2d ed.), § 246, where the whole subject of contributory negligence in actions for injuries from defective highways is minutely discussed in chapter X.

of law, in attempting to pass through or over it;¹ nor bound to exercise extraordinary care.² The question of his negligence in such a case is one of fact to be determined by the jury;³

¹ *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *Bullock v. New York*, 99 N. Y. 654; *McGuire v. Spence*, 91 N. Y. 303; *Brusso v. Buffalo*, 90 N. Y. 679; *Evans v. Utica*, 69 N. Y. 166; *Shook v. Cohoes*, 108 N. Y. 648; s. c., 15 N. E. Rep. 531; *Sandwich v. Dolan* (Ill.), 31 N. E. Rep. 416; *Ellis v. Peru City*, 23 Ill. App. 35; *Langan v. Atchison*, 35 Kan. 318. In the last case in Massachusetts (*Pomeroy v. Westfield*, 154 Mass. 462) in which this question was considered, Holmes, J., said: — "Even if it were found that the plaintiffs knew they were attempting a dangerous drive, it could not be said, as matter of law, that they were not warranted in doing so." See, also, *Linnehan v. Lampson*, 126 Mass. 506; *Eckert v. Long Island R. Co.*, 43 N. Y. 502; *Pennsylvania Company v. Langendorff*, 48 Ohio St. 316; *Maus v. Springfield*, 101 Mo. 613, 618. It has been so held as to one driving over a bridge which he knew to be defective. *Spearbracker v. Larrabee*, 64 Wis. 573; *Kelly v. New York & c. R. Co.*, 9 N. Y. Supl. 90; *Taylor v. Town of Constable*, 10 N. Y. Supl. 607; *Gulf & c. R. Co. v. Gasscamp*, 69 Tex. 545; *Monongahela Bridge Co. v. Bevard* (Pa.), 11 Atl. Rep. 575. In an action for personal injuries occasioned by a defective sidewalk, plaintiff's knowledge of the existence of the defect is not conclusive evidence of contributory negligence. *Argus v. Village of Sturgis* (Mich.), 48 N. W. Rep. 1085. Plaintiff was injured by the overturning of the sleigh in which she was riding, caused by embankments of snow and ice. All the streets were covered with deep snow, and, though the embankments were visible it was not clearly shown that they appeared

dangerous. Plaintiff had no special knowledge of driving, and was being driven by a man. It was held that she was not, as matter of law, guilty of contributory negligence in allowing herself to be driven along that street. *Carr v. City of Easton* (Pa.), 21 Atl. Rep. 822. See, also, *Beach on Contributory Negligence* (2d ed.), § 247.

² *County Commissioners v. Burgess*, 61 Md. 29; *Murphy v. Indianapolis*, 83 Ind. 76; *Huntingdon v. Breen*, 79 Ind. 29; *Maulby v. Leavenworth*, 28 Kan. 745.

³ *Palmer v. Dearing*, 93 N. Y. 7, 10; *Bassett v. Fish*, 75 N. Y. 304; *Weed v. Ballston Spa*, 76 N. Y. 329; *Niven v. Rochester*, 76 N. Y. 619; *Lanigan v. N. Y. Gas Light Co.*, 71 N. Y. 29. Where plaintiff drove through a street which was being repaired, and the condition of which he knew, and his horse was frightened and ran away, the question of contributory negligence was properly left to the jury. *Hotchkin v. Borough of Phillipsburg* (Pa.), 8 Atl. Rep. 434. Plaintiff on a dark night went home over a sidewalk which he knew to be dangerous. He was held not necessarily guilty of contributory negligence, although he might have avoided the sidewalk by taking to the street, or going between the sidewalk and a fence, or by going around the square, if these routes were not perfectly safe, but that it was a question for the jury whether he acted prudently under all the circumstances. *Gordon and Paxson, JJ., dissenting. City of Altoona v. Lotz*, 114 Pa. St. 238; s. c., 7 Atl. Rep. 240. See, also, *Hampson v. Taylor* (R. I.), 8 Atl. Rep. 331; *McKeigue v. Janesville*, 68 Wis. 50; s. c., 31 N. W. Rep. 298;

and the burden of proving his contributory negligence is upon the city.¹

§ 1537. Negligence in the presence of danger—Lawful obstructions.—Whether a place is so visibly and notoriously dangerous as to make the attempt to pass over it an act of negligence is ordinarily a question for the jury;² but there may be an exception to this rule in cases of extraordinary and appalling danger, as where a sudden freshet sweeps across the highway with wild and resistless force.³ It is strong evidence of negligence if one approaches a place he knows to be dangerous without looking where he is going.⁴ A traveler is

Byerly v. City of Anamosa, 79 Iowa, 204; s. c., 44 N. W. Rep. 359.

¹ The burden of proving contributory negligence is upon the city, and it may be proved by affirmative testimony, or deduced from all the evidence in the case; it must be established by a preponderance of evidence. *Gordon v. City of Richmond*, 83 Va. 436; s. c., 2 S. E. Rep. 727.

² *Emblen v. Town of Walkill*, 132 N. Y. 222; *Bly v. Whitehall Village*, 120 N. Y. 506, where the court said:—"The evidence does not disclose a situation so palpably unsafe that this court can affirm, as a matter of law, that the plaintiff was negligent." Thus in *Jung v. Stevens Point*, 74 Wis. 547, the court was held correct in refusing to charge "that if the jury found the plaintiff did not know the condition of the highway but saw the water was over the road and there was nothing to indicate the line between the highway and the river, and then deliberately drove into the water on the highway without making any inquiry into the danger, they must find the plaintiff guilty of negligence." When there is no visible sign to indicate that any portion of a road-bed is unsafe, a traveler is not obliged to follow the beaten track but may travel over any part of the

road prepared as a road-bed. *Wakeham v. St. Clair Township* (Mich.), 51 N. W. Rep. 696.

³ *Hopkins v. Rush River*, 70 Wis. 10; *Merrill v. North Yarmouth*, 78 Me. 200; *Phillips v. County Court*, 31 West Va. 477.

⁴ The testimony showed that plaintiff walked along the street without paying attention to the sidewalk, and that it was notoriously rotten, so that any one could see the earth beneath the plank. But the question of contributory negligence was left to the jury. *Osborne v. Detroit*, 32 Fed. Rep. 36. In an action to recover from a municipal corporation for leaving a deep and dangerous pit close to a street, into which plaintiff fell, and was injured, the evidence showed that he knew of the existence of the pit; that he had once before fallen into it; and that he fell into it while walking along at night, absorbed in thought, and not looking where he was going. He was held guilty of contributory negligence. *Walker v. Town of Reidsville*, 96 N. C. 382; s. c., 2 S. E. Rep. 74. For modifications of the rule in North Carolina, see *Bunch v. Edenton*, 90 N. C. 431; *Rigler v. Railroad Co.*, 94 N. C. 604; *Murray v. Railroad Co.*, 93 N. C. 92. In *Walker v. Reidsville*,

bound to observe the presence of lawful obstructions, such, for example, as a temporary substitute for a sidewalk, made in the course of building or a public improvement, and to exercise greater care than would be necessary upon a permanent sidewalk.¹ A traveler's right to use a highway is subordinate to the right of the authorities to make reasonable repairs, and a person who knows of a temporary defect co-existent with such repairs and voluntarily undertakes to brave it or test it, when it could be avoided, cannot recover for an injury thereby incurred.²

§ 1538. The same subject continued.— Not to avoid a dangerous place in a street by crossing the street or passing around through another street is not negligence as matter of law, but is a fact for the jury on a consideration of all the facts, and depends in each case on the degree of danger.³ But

supra, the court said:—"A reasonably careful and prudent man would not forget the presence of such danger in his immediate neighborhood—one that he had seen every day for a fortnight. He was bound to act on his information and use ordinary care and prudence in protecting himself from what he knew to be a menacing danger." See, also, *Railroad Co. v. Houston*, 95 U. S. 697; *Beach on Contributory Negligence* (2d ed.), § 37.

¹ *Nolan v. King*, 97 N. Y. 565. See, also, *Vicksburg v. Hennessy*, 54 Miss. 391; *Jacobs v. Bangor*, 16 Me. 187.

² *Crescent Township v. Anderson*, 114 Pa. St. 643; s. c., 8 Atl. Rep. 379; *Forks Township v. King*, 84 Penn. St. 230; *Pittsburgh R. Co. v. Taylor*, 104 Penn. St. 306. At the time of the injury complained of defendant city was engaged in grading and graveling two cross-streets. A sidewalk had been laid on one side of one street, terminating at its intersection with the other, where, as there had been no crossing constructed, it was left several inches above the surface, to

join on to the crossing when constructed. Plaintiff, while walking along the sidewalk, with knowledge of its unfinished condition, and without looking, walked off the end of it, receiving the injuries sued for. It was held that she was not entitled to damages. *City of Plymouth v. Milner*, 117 Ind. 324; s. c., 20 N. E. Rep. 235. See, also, *Larsh v. Des Moines*, 74 Iowa, 512.

³ The true rule was clearly and carefully stated by Devens, J., in *Parker v. Springfield*, 147 Mass. 391:—"There are different degrees of danger as there are defects in ways of a more or less serious character. As there are some defects which, if not rendering it absolutely impossible to pass over a way in safety, are such that only a reckless person would make the attempt, so there are others which would not prevent a prudent person from using the way, but would only impose upon him the duty of greater care and caution. It cannot therefore be said that, if one knows a way to be in any degree dangerous, he can only use the high-

ordinarily it is strongly presumptive of negligence to incur a known danger which can be avoided by a slight change of the route.¹ Of course, the ordinary rule is wholly reasonable where there is no other way leading to the traveler's destination,² or

way at his own risk. Whether he acts prudently in attempting to use it, and takes the precautions he should in so doing, are questions for the jury." In an action for personal injuries sustained through a defective sidewalk plaintiff testified that she had often walked over the sidewalk in question, but expressly denied that she knew of its dangerous condition. It was held that whether plaintiff acted negligently in attempting to cross over the sidewalk instead of the opposite sidewalk, which was in good condition, was a question for the jury. *Boland v. City of Kansas*, 33 Mo. App. 8. In an action against a city for injuries caused by a defective sidewalk, it appearing that plaintiff knew the sidewalk was out of repair and dangerous but that the injury probably resulted from a latent defect of which plaintiff was ignorant, and that plaintiff might have gone another way but little longer, an instruction that, if plaintiff knew the sidewalk to be dangerous, it was her duty to use all care to avoid defendant's negligence, and if she could have gone another way but little further she could not recover, would be improper. *Moore v. City of Huntington*, 31 West Va. 842; s. c., 8 S. E. Rep. 512. In an action against a city for injury caused by falling on a defective sidewalk which plaintiff knew to be out of repair it is error to instruct the jury that, if plaintiff's most direct route home was over that sidewalk, then the fact that it was defective and had been so for some months would not oblige him to take a less convenient route, since the question whether plaintiff exercised

ordinary care is one of fact. (*City of Aurora v. Hillman*, 90 Ill. 61, distinguished.) *City of Sandwich v. Dolan*, 133 Ill. 177; s. c., 24 N. E. Rep. 526.

¹ *Fulliam v. Muscatine City*, 70 Iowa, 436; *Parkhill v. Brighton*, 61 Iowa, 103. One who undertakes to use a public road knowing it is unsafe and what defects made it so, and not choosing to avoid them by taking another road, precludes himself from recovery against the township; and where the facts are undisputed the court should instruct a verdict for the township. *Hill v. Tionesta Township*, 146 Penn. St. 11. While the mere fact that the crosswalk was steep and dangerous, and that there was a safe way which plaintiff could have taken, will not prevent recovery, still, if knowing it to be dangerous, he knew or might have known that it was not prudent to walk over the crossing and down the slope and that there was another way he could have taken without material inconvenience, he could not recover, and the jury should have been instructed that the question of prudence was controlling. *Hartman v. City of Muscatine*, 70 Iowa, 511; s. c., 30 N. W. Rep. 859. See, also, *Gribble v. Sioux City*, 38 Iowa, 390; *Moore v. Abbott*, 32 Me. 46; *Gilman v. Deerfield*, 15 Gray, 577.

² Plaintiff's wife, the person injured, admitted that she knew that the sidewalk was not in good repair, but there was nothing to show that she regarded it as dangerous. She had passed over the walk frequently and others passed over it daily without mishap. At the time of the acci-

where the traveler knowing of the defect does not know it to be dangerous.¹

§ 1539. Duty to look and listen.— One who passes along a sidewalk is not bound to look and listen like one who approaches a railroad crossing, and is not negligent for not being on his guard against a defective or unlawful condition of the sidewalk² or of the carriage-way;³ he is not bound to anticipate

dent she was walking in the usual way, carefully, and this was the only walk leading to the place of her destination. Her conduct was held no such contributory negligence as to require the court to direct a verdict for defendant. *Troxel v. City of Vinton*, 77 Iowa, 90; s. c., 41 N. W. Rep. 580; *Kendall v. Albia City*, 73 Iowa, 241.

¹ Though a person injured by a defect in a street after dark knew of such defect, but did not know it was dangerous, he cannot be said, as a matter of law, to be guilty of contributory negligence in attempting to use the street, but the question is for the jury. *City of Richmond v. Mulholland*, 116 Ind. 173; s. c., 18 N. E. Rep. 832. In an action against a city for injuries caused by a defective sidewalk it appeared that plaintiff knew that the sidewalk was out of repair and dangerous; that the injury to plaintiff was not necessarily caused by the apparent defects, but possibly by the breaking of a decayed plank covering a culvert and which the plaintiff could not have detected by any reasonable prudence or care. It was held it was proper to submit the plaintiff's evidence showing these facts to the jury. *Moore v. City of Huntington*, 31 West Va. 842; s. c., 8 S. E. Rep. 512.

² *Gordon v. Richmond*, 83 Va. 436; *McGuire v. Spence*, 91 N. Y. 303. In *Chicago v. Babcock* (Ill., Oct., 1892),

³ 32 N. E. Rep. 271, the court said:—

"A person passing along a sidewalk in a city is required to use ordinary and reasonable care and diligence to avoid danger, but what is such ordinary and reasonable care depends upon the circumstances of each particular case, and is a question of fact for the jury. A pedestrian upon such sidewalk may ordinarily assume that the sidewalk is in a reasonably safe condition for travel. To hold that such person is absolutely bound to keep his or her eyes constantly fixed on the sidewalk in a search for possible holes or other defects would be to establish a manifestly unreasonable and wholly impracticable rule." A person is not guilty of contributory negligence in not being on the lookout for an excavation in a public street, especially if the street was in a good condition when he passed over it last. *City of Houston v. Isaacs*, 68 Tex. 116; s. c., 3 S. W. Rep. 693. Plaintiff was injured by falling into a hole in the sidewalk in front of defendant's premises. Plaintiff did not know of the existence of the hole, and, her attention being diverted, she did not notice it and fell in. The fact that her attention was momentarily distracted was held not to constitute contributory negligence. She had the right to assume that the sidewalk was safe. *Barry v. Terkildsen*, 72 Cal. 254; s. c., 13 Pac. Rep. 657. In an action for injuries caused by de-

³ *Houston v. Isaacs*, 68 Tex. 116.

danger without some knowledge of a condition of things suggesting danger.¹ On the one hand streets and sidewalks should be in such a condition that travelers can use them without constant fear and solicitude; on the other, no traveler can shut his eyes to defects which he daily sees or which are obvious as he passes along.² The fact of running on a street and not looking where one steps is not of itself negligence if the street is not known to be unsafe,³ for contributory negligence in such a case is a question for the jury on all the facts, and therefore it is error to charge the jury that one must use his eyes as well as his feet, to look where he is going and observe the condition of the sidewalk.⁴ The jury are to consider that things may naturally have diverted the attention of plaintiff from the defect in the street.⁵

§ 1540. Pedestrians' duty to use crossings and sidewalks.
In New York a person desiring to cross a street is not confined

fective steps to a public building it is not error to charge that "a person passing down the steps . . . is not charged with the exercise of an active vigilance;" that is, "being upon the lookout for danger." *Swart v. New York*, 5 N. Y. Supl. 98. See, also, *Cantwell v. City of Appleton*, 71 Wis. 463; s. c., 37 N. W. Rep. 813; *Turner v. Newburgh*, 109 N. Y. 301; s. c., 16 N. E. Rep. 344.

¹*Turner v. Newburgh*, 109 N. Y. 301, 307, where the court said:—"The street was open for public travel, and it does not appear that plaintiff knew of any defect in the crossing, and without such knowledge or notice she had the right to assume it was safe and secure."

²*Parker v. Springfield*, 147 Mass. 391; *Moore v. Huntington*, 31 West Va. 842, 848. A hole into which plaintiff fell was between and about eighty feet from two gas-lamps, which were lighted at the time, and by the light of which a person could see objects on the sidewalks so small as pieces of cinders. Plaintiff ad-

mitted that a person could have seen the sidewalk if he had looked at it. He was held guilty of gross negligence. *Moore v. Richmond*, 85 Va. 538; s. c., 8 S. E. Rep. 387.

³*Barr v. Kansas City*, 105 Mo. 550; s. c., 16 S. W. Rep. 483.

⁴*Chicago v. McLean*, 133 Ill. 148. For such a charge might take the question of negligence from the jury and declare that if certain facts exist negligence is established. *Myers v. Indianapolis &c. R. Co.*, 113 Ill. 386. In the *McLean* case just cited the case of *Kewanee v. Depew*, 80 Ill. 119, is distinguished by the fact that the defect was known.

⁵It is for the jury to find whether one who, not knowing of a hole in the sidewalk, steps into it in the daytime while in the act of raising her umbrella, was guilty of contributory negligence. *City of Philadelphia v. Smith (Pa.)*, 16 Atl. Rep. 493; 23 W. N. C. 242. The question of contributory negligence being one of fact for the jury, the court properly refused to charge that if the night

to the crossings either in the day or night; he may cross at any point that suits his convenience without imputation of negligence, for he has the right to assume that all parts of the street intended for travel are reasonably safe.¹ He has not, however, the right to assume that all parts of the street are as smooth and even as the regular crossings, and particularly at night it cannot be said to be wholly prudent for a person not to use convenient crossings which he sees before him.² A person who is injured by voluntarily stepping from a sidewalk into a hole which he does not see is guilty of such negligence as will prevent a recovery;³ and the same is the rule where a pedestrian voluntarily leaves the highway in order to take a by-path.⁴ In some States voluntarily leaving the sidewalk and walking on the carriage way is deemed an act of negligence,⁵ but in other States is to be submitted to the jury with

was fair and two street lamps were burning brightly near the place of the obstruction or defect in defendant's sidewalk where plaintiff fell and received the injuries complained of, he could not recover. *City of Scranton v. Gore*, 124 Pa. St. 595; 23 W. N. C. 419.

¹ *Brusso v. Buffalo*, 90 N. Y. 679.

² In *Raymond v. Lowell*, 6 Cush. 524, the court, after speaking of the general right of foot passengers to use the carriage way thus continues:—"But a town is not obliged to keep all the way, by the sidewalk in an equally suitable and convenient condition for crossing. This would be wholly impracticable. The necessity of providing for draining off the water requires that streets and sidewalks should be constructed with a view to that object; so if a foot passenger, instead of availing himself of a crossing especially prepared, chooses to cross at another place, he must take care and see what is the actual state of the space between the sidewalk and the street. He has no right to assume that the way from the sidewalk to the street is smooth and even,

but must exercise a caution and prudence adapted to the nature of the case." See, also, *Cotterill v. Starkey*, 8 Car. & P. 691; *Boss v. Litton*, 5 Car. & P. 407.

³ *Alline v. Le Mars City*, 71 Iowa, 654; *McLaury v. McGregor City*, 51 Iowa, 717; *Zettler v. Atlanta*, 66 Ga. 195.

⁴ *Scranton City v. Hill*, 102 Penn. St. 378. Where a traveler unnecessarily, for his own convenience, leaves the highway, and in so doing meets with an accident outside of the highway, the city cannot be responsible, no matter how near the highway the obstruction may be. *Biggs v. City of Huntington*, 32 West Va. 55; s. c., 9 S. E. Rep. 51.

⁵ *O'Laughlin v. Dubuque*, 42 Iowa, 539. Where, in an action against a city for personal injuries received by plaintiff by falling into an unguarded area way in an alley, it appears that the plaintiff, without any reason, walked out of his way on a dark night into the alley, it is reversible error to refuse to instruct the jury to the effect that, if it was imprudent to enter the alley on account of the

the other facts on the question of contributory negligence,¹ while in still other States it is deemed negligence not to leave a dangerous sidewalk and walk on the roadway.² Though such a volunteer may have to assume the risk of apparent dangers, it is otherwise as to concealed defects allowed to continue through municipal negligence.³

§ 1541. The same subject continued — Care required at night.— The attempt to pass a dangerous place in a street in the darkness is not conclusive of negligence, but is a fact for the jury.⁴ In accordance with the foregoing rule it is not negligence, as matter of law, for a person to drive a blind

darkness, and if the plaintiff persisted in going in there when he might have taken a nearer and safer way, he was guilty of contributory negligence. *Ely v. Des Moines* (Iowa), 52 N. W. Rep. 475.

¹ *Gerald v. Boston*, 108 Mass. 580; *Raymond v. Lowell*, 6 Cush. 524.

² *Yorker v. Sandy Lake Borough*, 130 Penn. St. 123.

³ *Moore v. Huntington*, 31 West Va. 842.

⁴ *Finn v. Adrian City* (Mich., Nov., 1892), 53 N. W. Rep. 614; *Bly v. Whitehall Village*, 120 N. Y. 506; *Pomeroy v. Westfield*, 154 Mass. 462; *Avery v. Newton*, 148 Mass. 598. Plaintiff had previous knowledge of the defect in the sidewalk, and testified that if she had been thinking about it, or looking for it, she would not have stepped into it. It appeared that the accident occurred at night, during stormy weather, when a mist prevailed, and that plaintiff had two of her children in charge, was in an anxious state of mind, and in a hurry to get home. The question of contributory negligence was properly left to the jury. *Dundas v. City of Lansing*, 75 Mich. 499; s. c., 42 N. W. Rep. 1011. In an action for damages resulting from a fall into an excavation in a sidewalk, when the evidence shows that the plaintiff

knew of the excavation, and that on a dark night, passing that way, and remembering the defect, he attempted to pass around it, but by reason of misjudging the distance, and the excavation being unguarded, he fell into it and was injured, the question of his contributory negligence is for the jury. *Village of Orleans v. Perry*, 24 Neb. 331; s. c., 40 N. W. Rep. 417. A stranger passing along a street at night came to a break in the sidewalk, and endeavored to descend, but while so doing, in a careful manner, he fell on a saw bench which had been left on the ground at the end of the sidewalk, and was injured. It was held not contributory negligence. *Village of Ponca v. Crawford*, 23 Neb. 632; s. c., 37 N. W. Rep. 609. See, also, *Galveston v. Hemmis*, 72 Tex. 558; *Shenandoah Borough v. Erdman* (Pa.), 12 Atl. Rep. 814. In an action for injuries sustained by falling into an excavation made the day of the accident across a sidewalk, and left open at night, without lights or guard, and which plaintiff had stepped across on the opposite side of the street during the day, contributory negligence could not be predicated as a matter of law, but was a question for the jury. *City of Birmingham v. McCrary* (Ala.), 4 So. Rep. 630.

horse on a dark night, but such an act is for the jury.¹ The strict Indiana rule is that if one knows of a dangerous place or obstruction in a sidewalk or street and attempts to pass over it in the darkness he cannot recover for the injury he may thereby sustain;² and this is the rule in some of the other States;³ even to the extent of requiring a person to leave a dangerous sidewalk and walk in the roadway.⁴

§ 1542. **Infirm persons—Duty of caution.**—Streets and sidewalks are for the use of persons of defective sight and hearing and for the infirm. A blind man on the street must be more cautious than one who can see, but it is not conclusive of negligence for him to be abroad.⁵ In passing upon the negligence of a blind man in going unattended upon the streets the jury are to consider the increased vivacity of his other senses, his acquaintance with the locality, his habit of going about alone, and his general capacity to take care of himself.⁶ The very old have a right to be on the street and

¹ *Brackenridge v. Fitchburg*, 145 Mass. 160. See *Smith v. Wildes*, 143 Mass. 556; *Wright v. Templeton*, 132 Mass. 49; *Daniels v. Lebanon*, 58 N. H. 284. In the *Brackenridge* case Holmes, J., said:—"Whatever the degree of darkness, it was for the jury to say whether the horse's possession of sight would have diminished appreciably the chances of accident, and it was at least open to them that the plaintiff had the right to assume that the city had done its duty and therefore that he was not bound to provide against its possible neglect." See, also, *Learoyd v. Godfrey*, 138 Mass. 315, 324; *Thompson v. Bridgewater*, 7 Pick. 188; *Glidden v. Reading*, 38 Vt. 52.

² *Brucker v. Covington*, 69 Ind. 33; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Indianapolis v. Gaston*, 58 Ind. 224; *Jonesboro Co. v. Baldwin*, 57 Ind. 86; *Riest v. Goshen City*, 42 Ind. 339; *Mt. Vernon v. Dusouchett*, 2 Ind. 586.

³ In an action against a municipal

corporation for personal injuries, plaintiff testified that she fell over a rock while she was walking in the dark on a street that she knew to be obstructed and dangerous, though there were no danger signals to mark the obstructions. It was held that plaintiff was guilty of contributory negligence, and her evidence should have been excluded from the jury as insufficient to sustain the issue on her part. *Hesser v. Grafton*, 33 West Va. 548; s. c., 11 S. E. Rep. 211.

⁴ *Forkes v. Sandy Lake Borough*, 130 Penn. St. 123; *Erie City v. McGill*, 101 Penn. St. 616.

⁵ *Davenport v. Ruchman*, 37 N. Y. 568; *Harris v. Webelhoer*, 75 N. Y. 169, 175. In *Requa v. Rochester*, 45 N. Y. 129, it was held that the fact of plaintiff's imperfect sight would not justify taking the question of his contributory negligence from the jury.

⁶ *Sleeper v. Landown*, 52 N. H. 244, where the court said:—"Suppose defective vision, instead of total blind-

to assume it is reasonably safe for their use.¹ Their age is not such a disability as obliges them to remain at home or to go abroad at their peril.

§ 1543. Intoxication as contributory negligence.— While a drunken man is as much entitled to a safe street as a sober man and more in need of it,² yet if his intoxication contributes to the accident, he cannot recover though the street was defective.³ An intoxicated person is not, however, an outlaw, and a mere concurrence in point of time of his intoxication

ness, contributes to an accident or defect in any other of the senses, the loss of an arm or a leg, or sickness, or the infirmity of age or the weakness of childhood, would not the question in such cases most clearly be, whether, considering the condition of the person injured, it was want of ordinary care in him to be traveling on the highway at all. . . . Blindness is no more negligence than near-sightedness, and probably no more likely on the whole to contribute to an accident; and whether any one of the senses be wholly obliterated, or only obscured, cannot, as we can see, make any difference with the application of the rule. Assuming, then, that the plaintiff in this case might, with a reasonable assurance of safety, undertake to cross this bridge, so that he was in no fault for being there, and that the accident was the combined result of his blindness and the want of a rail which the town ought to have supplied, it follows that his fault did not contribute and he is entitled to recover. All the evidence tending to show the extraordinary ability of plaintiff after he became blind, in executing various kinds of work, etc., was clearly admitted upon the question whether it was a reasonably prudent act for him to attempt to pass the bridge."

¹ Plaintiff, a man of eighty-two

years, on a bright day, with nothing to obstruct the vision, fell into a hole caused by the displacement of a flagstone over a gutter. At the time he was somewhat dazzled by the sun, and his attention attracted by some one calling. The flag had been displaced by a rainstorm about a week before the accident. The village authorities had notice of it, but plaintiff had none. The street was traveled considerably; and though the flags were not laid as a sidewalk, but merely to cover a gutter, there was no other walk on that side of the street, and they were used as a walk. A verdict for plaintiff was sustained, plaintiff's negligence being a question for the jury. *O'Reilly v. Village of Sing Sing*, 1 N. Y. Supl. 582.

² *Robinson v. Pioche*, 5 Cal. 460.

³ Where plaintiff falls from a sidewalk down an embankment, defendant city is not liable, though the sidewalk was defective, if plaintiff was intoxicated, and such intoxication contributed to the accident. *Lynch v. New York*, 47 Hun, 524. Where the jury found that one using ordinary care could pass over the sidewalk without danger, the testimony of nine witnesses that plaintiff was drunk at the time is sufficient, against his denial, to support a finding of contributory negligence. *McCracken v. Village of Markesan*, 76 Wis. 499; s. c., 45 N. W. Rep. 323.

and the injury will not bar his recovery against the city.¹ It is obvious enough that the intoxication of a man driving across a bridge does not contribute to the fall of the bridge;² and the general rule is that while intoxication is not conclusive evidence of negligence it is competent evidence.³ But drunkenness as a self-imposed disability is not regarded with the indulgence accorded to blindness or deafness, and especially when a drunken man is a trespasser he must enjoy his pleasure at his own risk.⁴

§ 1544. Violation of ordinance, etc., as contributory negligence.—The rule that the violation of a law or regulation intended to prevent an accident is *prima facie* a contributory cause of the accident⁵ does not apply where the accident is

¹ *Alger v. Lowell*, 3 Allen, 406. As Brady, J., said in *Healy v. New York*, 3 Hun, 708:—"By putting himself in that unfortunate condition he was not abandoned by the law. He was only subjected to its consequences whatever they might be, and if his drunkenness in any way contributed to his injury he must bear the burden. Whether it did or not was for the jury to determine."

² *Ford v. Umatilla County*, 15 Oregon, 313.

³ *Aurora v. Hillman*, 90 Ill. 61; *Rock Island v. Vanlandschoot*, 78 Ill. 485; *Baker v. Portland*, 58 Me. 199; *Stuart v. Machiasport*, 48 Me. 477; *Seymer v. Lake*, 66 Wis. 651; *Weymire v. Wolfe*, 52 Iowa, 533; *Loewer v. Sedalia City*, 77 Mo. 431; *Salina City v. Trospen*, 27 Kan. 545; *Cassedy v. Stockbridge*, 21 Vt. 391; *Fernbach v. Waterloo (Iowa)*, 34 N. W. Rep. 610. In *Thorp v. Brookfield*, 36 Conn. 320, defendant requested the court to charge that if the plaintiff's driver was grossly intoxicated at the time of the accident the plaintiff could not recover, but the court was held to be correct in charging "that the

intoxication of the driver would not of itself relieve the town of liability; but the question was whether or not he exercised reasonable care to avoid the danger; and that should the jury find he was intoxicated at the time of the accident they should take his condition into consideration with the other facts in determining such question."

⁴ *Beach on Contributory Negligence* (2d ed.), § 391; *Dunman v. St. Paul R. Co.*, 26 Minn. 357; *Herring v. Wilmington R. Co.*, 10 Ired. 402.

⁵ *Cordell v. N. Y. Central & C. R. Co.*, 64 N. Y. 535; *Gorton v. Erie R. Co.*, 45 N. Y. 660. In an action against a city for injuries to a traveler from the collision of his carriage with a hitching-post in a highway on which he was traveling in the night, it appeared that the way was sixteen and one-half feet wide, and that sidewalks had been built on both sides; the entire width of the street was taken up by carriage-way, sidewalk and slope; the post was on the outer edge of the slope, and on the border of the carriage-way. There was a city ordinance prohibiting driving on sidewalks. The accident happened

not the necessary legal or physical consequence of such violation; as where a traveler, having violated an ordinance by driving on a sidewalk, afterwards meets with an accident while driving on a foot-bridge, to which the ordinance does not apply.¹

§ 1545. Travelers' haste.—A pedestrian's or driver's haste on the street is not negligence as matter of law, but it is to be considered by the jury in connection with the attending facts;² for haste is often the result of necessity or of anxiety naturally produced by the urgency of the situation.³ Proof of an ordinance prohibiting fast driving is inadmissible where there is no evidence of immoderate driving at the time of the accident.⁴

while plaintiff was attempting to pass a vehicle in front of him, and the evidence tended to show that in so doing he went on the sidewalk. The narrowness of the way was known to plaintiff. It was held that a verdict for defendant would not be disturbed. *Arey v. City of Newton*, 148 Mass. 598; s. c., 20 N. E. Rep. 327, where the court said:—"A traveler cannot justify driving upon a sidewalk in violation of an ordinance merely because it is convenient in order to pass at a particular place a wagon that is before him. If any necessity would justify violating an ordinance of this kind, mere convenience would not. *Commonwealth v. Adams*, 114 Mass. 323."

¹ *Fisher v. Cambridge Village*, 183 N. Y. 527, where the court made the following illustration of the restriction:—"If there had been an ordinance that every one driving on the highway bridge should keep to the right, would the fact that a person drove to the left, at a time when no one else was on the bridge, be a defense to an action to recover damages sustained by the bridge going

down while such person was so driving on the left side of the bridge? The purpose of the ordinance would be regarded; and when it was seen that its purpose was to prevent accidents from collisions, and that it assumed the equal safety of both sides of the bridge so far as its ability to sustain a load was concerned, it certainly could not be held that in driving to the left under such circumstances the person was guilty of negligence which contributed to the injury because he thereby violated an ordinance."

² *Barr v. Kansas City*, 105 Mo. 550. Though plaintiff, when he fell from a sidewalk, was walking much faster than his companion, it does not necessarily follow that he was negligent, but it is a question of fact whether his speed was contributory negligence. *Borough of Sandy Lake v. Forkes*, 130 Penn. St. 123; s. c., 18 Atl. Rep. 609.

³ *Dundas v. Lansing City*, 75 Mich. 499, 509.

⁴ *Fernbach v. Waterloo (Iowa)*, 34 N. W. Rep. 610. See, however, s. c., 76 Iowa, 598.

§ 1546. Pleading and proof as to contributory negligence. The rule in New York is that plaintiff's allegation in his complaint that defendant's negligence caused the injury carries with it the inference that such negligence alone was the cause, and so dispenses with the allegation that there was no contributory negligence on the part of plaintiff.¹ The burden of proof is on plaintiff to show that there was no contributory negligence on his part.² In many of the States the burden of proving the absence of contributory negligence rests on the plaintiff.³ Reference is here made to certain valuable articles in current legal periodicals⁴ upon the general subject consid-

¹ *Urquhart v. Ogdensburgh*, 23 Hun, 75; *Lee v. Troy & Co. Co.*, 98 N. Y. 115; *Hale v. Smith*, 78 N. Y. 480; *Hackford v. N. Y. Central R. Co.*, 53 N. Y. 654; *Robinson v. N. Y. Central R. Co.*, 66 N. Y. 11; *Mele v. Delaware Canal Co.*, 27 Jones & Sp. 367; *Haskell v. Penn Yan Village*, 5 Lans. 43, 48.

² *Urquhart v. Ogdensburgh*, 23 Hun, 75; *Cordell v. N. Y. Central R. Co.*, 75 N. Y. 330; *Reynolds v. N. Y. Central R. Co.*, 58 N. Y. 248.

³ *Fernbach v. Waterloo*, 34 N. W. Rep. 610; *Beach on Contributory Negligence* (2d ed.), ch. XV.

⁴ "Highways by limitation or adverse user." 7 Cent. L. J. 123. "Ownership of soil of highway." 16 Sol. J. & Rep. 14; reprinted, 8 Can. L. J. 194. "Local authorities and disused streets." 69 L. T. 384. "Liability of municipal corporations for injuries from defect in highway." Annotation by Judge Redfield. 13 Am. L. Reg. (N. S.) 423. "Liability of municipal corporations for injuries caused by neglect to repair streets." Annotation by Judge Redfield. 8 Am. L. Reg. (N. S.) 670. "Right of dedication where highway is founde-
rous." 54 L. T. 339, reprinted in 7 Irish L. T. 144; 5 Chicago L. N. 367; 7 Alb. L. J. 209. "Liability of mu-

nicipal corporations for injuries caused by abutting proprietors." A note by C. F. Haddock, Esq. 23 Cent. L. J. 106. "Liability of municipal corporations for injuries received by pedestrian from sled of coaster." 11 Wash. L. Rep. 34. "Liability of municipal corporations for injuries to individuals." Annotated case by William Drayton, Esq. 23 Am. L. Reg. (N. S.) 501. "Doctrine of *respondet superior* as applied to municipal corporations." By W. F. Elliott, Esq. 21 Ont. L. J. 33. "Liability for municipalities for nonfeasance." 68 L. T. 347, reprinted in 12 Chicago L. N. 249. "Consequences of obstruction of highways." 66 L. T. 76. "Notice of defects in streets." Annotations, 27 N. W. Rep. 110. "Liability of municipal corporation for objects in streets which frighten horses." Annotations, 20 Ont. L. J. 106. "Municipal corporations and slippery sidewalks." 7 Alb. L. J. 33. "Care of sidewalks." Annotations, 27 N. W. Rep. 283. "Defective sidewalks." Annotations by James M. Kerr, Esq. 5 N. E. Rep. 578, and 26 N. W. Rep. 129. "Liability of municipal corporations for damages caused by defective sidewalks." By James M. Kerr, Esq. 27 N. W. Rep. 110. "Liability of municipal corporations for

cred in this chapter, in which the careful reader will discover much useful and pertinent matter.

dangerous condition of sidewalk." *M. Kerr, Esq.* 4 N. E. Rep. 808, and Annotation by S. S. Merrill, Esq. 23 Cent. L. J. 494. "Whether parishes are bound to restore highways destroyed by natural causes." 6 Just. P. 245. "Roadside strips." 12 Wash. L. Rep. 670. "Right of public to resume possession after long lapse of time." 9 L. T. 460.

"Liability of municipal corporations for defects in streets and sidewalks." Note by James M. Kerr, Esq. 24 N. W. Rep. 506. "Liability of municipal corporations for injuries caused by snow or ice on sidewalks." Annotations by James

CHAPTER XXXVII.

MANDAMUS AND QUO WARRANTO.

(a) MANDAMUS.

- § 1547. *Mandamus* to compel restoration of members — To call election.
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- 1577. The same subject continued.
- 1578. The same subject continued — Control of discretion.
- 1579. Discretion to remove obstructions further considered.
- 1580. To appoint school trustees.
- 1581. Apportionment, etc., of school moneys.
- 1582. To restore school funds.
- 1583. To compel signing of teachers' warrants.
- 1584. To dissolve an injunction against a city.
- 1585. To compel approval of official bond.
- 1586. Approval of bonds continued.
- 1587. To restore removed officials.
- 1588. To compel execution of tax deed.
- 1589. To compel approval of contract.
- 1590. To a county treasurer to refund taxes.
- 1591. Abatement of public nuisance — Canvass of election — To police commissioners to enforce law.

§ 1592. Obstructions in streets—Contract for improvement.

1593. For payment of claim.

1594. The same subject continued.

1595. Title to office and custody of records.

1596. License to sell liquors.

1597. The same subject continued—Hearing of complaint.

1598. By tax-payer to compel investment of funds.

1599. To levy tax to pay a judgment—Previous demand.

1600. The same subject continued.

1601. Peremptory or alternative.

1602. Practice—Parties.

1603. Parties further considered.

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1609. Improvement of highways.

(b) QUO WARRANTO.

§ 1610. Scope of proceeding—Title to office—Policeman.

1611. Validity of incorporation—Evidence.

1612. Against municipal officers under void organization.

1613. Usurpation of franchise by a city—Parties.

1614. Common council as judge of election.

1615. *Mandamus* and *quo warranto* distinguished.1616. Florida decisions on *quo warranto*—Council as judges of election.

1617. Practice in Massachusetts—Contest of election.

1618. *Quo warranto* against municipal corporation.

1619. Jurisdiction of court.

1620. Election contests—Rules in Colorado.

1621. Title to office—Practice in Michigan.

(a) MANDAMUS.

§ 1547. *Mandamus* to compel restoration of member—To call election.—In collecting the law as to *mandamus* and *quo warranto* the examination has been confined to the most recent cases so as to give an idea of how the courts in the different jurisdictions are now holding as to the issue of writs of this nature and the proceedings thereunder as governed by the statutes of the different States as to procedure. *Mandamus* may be directed to municipal as well as other corporations established by law, to compel them to receive and restore to their functions such of their members as they shall have refused to receive, and whom they shall have removed without sufficient cause.¹ *Mandamus* is the proper remedy in favor of a person claiming an office for which he has qualified and been commissioned to compel one holding over from a previous term to surrender the books and other property of

¹ *State v. Shakspeare* (La.), 8 So. Rep. 893.

the office, but it settles no question as to the ultimate right to the office for the term for which the commission has been issued.¹ It has been held in California that a petition for a writ of mandate to compel the submission of a certain question to the electors of a city concerning the separation of certain lands from the territory under the municipal jurisdiction of the city need not state under which of two statutes the election should be called, where the two acts are identical so far as is material to the petitioner's case. And where the common council and mayor of a city refused to order an election as provided by statute, it is to be presumed that they refused on account of some honest doubt as to their power in the premises, and that they will proceed to perform their duty as prescribed by the statutory law immediately upon being informed of a decision of the Supreme Court upholding their power so to do, and the Supreme Court will not order the election and fix the day therefor upon granting a *mandamus* to compel the calling of the election.²

§ 1548. Refusal to grant mandamus illustrated — Issuance discretionary.— Where a city council passes over the mayor's veto an ordinance providing for the issue of bonds in excess of the amount of indebtedness which the city can lawfully incur, *mandamus* will not lie to compel the mayor to sign the bonds.³ In an action against a county and its county board for damages growing out of the construction of a ditch by the board, and thereby causing large quantities of water to flow over the land of the plaintiff, an injunction having finally been granted to restrain the county and county board from thus overflowing his land, the Supreme Court of Nebraska, as it did not appear that the duty imposed upon the county and county board by the decrees of the district court could not be enforced by that court in the due course of law, denied a *mandamus* to enforce that duty.⁴ A sound judicial discretion is to be used as to granting writs of *mandamus*,

¹ State v. Saxon (1889), 25 Fla. 792. See, also, High on Extraordinary Remedies, § 73; People v. Kilduff, 15 Ill. 492; People v. Head, 25 Ill. 325.

² People v. Common Council of

City of San Diego (1890), 85 Cal. 369; s. c., 24 Pac. Rep. 727.

³ Chalk v. White (Wash., 1892), 29 Pac. Rep. 979.

⁴ State v. County of Fillmore (1891), 32 Neb. 870; s. c., 49 N. W. Rep. 769.

and where circumstances make it unwise and inexpedient to allow the writ it should be refused when sought to enforce merely private rights.¹ Applying this principle to the circumstances of a case before it, the Supreme Court of Mississippi, notwithstanding the clear legal right of the relators, publishers of school text-books, and the unlawful conduct of the superintendent of education in not contracting with the relators for text-books, and contracting with other publishers for their system of books, held that the refusal of a writ of *mandamus* to compel the superintendent to contract with the relators was proper, since to have allowed it would have seriously affected public interest, by changing the books in use.²

§ 1549. Denial of writ further illustrated.—The writ of *mandamus* never lies to compel the officer of a county to do an act which is forbidden or not authorized by the laws of the State.³ Since the statute of New York requiring “police officials” to take a certain oath in relation to their interest in the manufacture and sale of intoxicating liquors does not declare the offices therein enumerated vacant by reason of the failure of the officers to take the oath, but merely disqualifies a person from holding such office, and furnishes a cause of forfeiture, *mandamus* to fill a vacancy will not lie. A vacancy can be created only by a direct proceeding for that purpose.⁴ One is not entitled to a *mandamus* to compel a city council to issue to him a certificate of election as councilman where he has made no demand for the issue of such certificate.⁵

¹ *Effingham v. Hamilton* (1891), 68 Miss. 523; s. c., 10 So. Rep. 39. See, also, *State v. Board of Education*, 24 Wis. 683; *People v. Contracting Board*, 27 N. Y. 378.

² *Effingham v. Hamilton* (1891), 68 Miss. 523; s. c., 10 So. Rep. 39.

³ *Chicot County v. Kruse* (1885), 47 Ark. 80; s. c., 14 S. W. Rep. 469, reversing the court below and ordering a dismissal of the petition for a *mandamus* to compel the county court to audit a claim for feeding of jurors, approved by the circuit court,

for a price increased by reason of the low market value of county scrip. See, also, *Supervisors v. United States*, 18 Wall. 77; *United States v. County of Clark*, 95 U. S. 769; *United States v. Labette County*, 2 McCrary, 25; s. c., 12 Cent. L. J. 36; *State v. Macon County Court*, 68 Mo. 29; s. c., *sub nom.* *State v. Walker*, 7 Cent. L. J. 390.

⁴ *People v. Board of Trustees of Mt. Vernon*, 13 N. Y. Supl. 447.

⁵ *State v. Smith* (Neb.), 48 N. W. Rep. 468.

§ 1550. **The same subject continued.**— The Supreme Court of Michigan, in denying a writ of *mandamus*, has held that the claim of a county clerk for issuing subpoenas to delinquent tax-payers under the tax law of that State, and for moneys paid the register of deeds for searches in his office to ascertain the names of such owners, was not such a claim as the board of supervisors could be compelled to audit and allow, although, upon a proper showing under a provision of the tax law, the board might be required to determine the amount of compensation, if any, the relator should receive for his services under that law, and how it should be paid.¹ In Mississippi it has been held that although the holder of a written order on the board of supervisors of a county for the issuance of a warrant for part of a debt due by the county for building a bridge is to that extent the equitable assignee of the debt, he cannot, by *mandamus*, compel the board to make an allowance and issue a warrant in his favor for the amount named in the order.² In New York it has been held under a provision of a city charter that “the common council shall . . . be the judge of the election and qualification of its own members,” that the duties of a new council, in determining the election of its members, are judicial, and not ministerial, and that *mandamus* will not lie to compel them to seat a person returned as alderman-elect by the inspectors of election.³

§ 1551. **The same subject continued — Reinstatement of officer — Canvass of election.**— Under the New York statute requiring that in every public department honorably discharged Union soldiers shall be preferred for appointment, a *mandamus* to compel a sheriff to reinstate a clerk whose employment ended with the expiration of the preceding sheriff's term of office will not issue where the application fails to show that the clerk applied for the position before his successor was appointed, or that his successor was not himself

¹ *Sherman v. Board of Supervisors* Supl. 214. See, also, *People v. Hall*, of Sanilac County (1890), 84 Mich. 80 N. Y. 117; *People v. Common* 108; s. c., 47 N. W. Rep. 513. Council, 78 N. Y. 33; *People v.*

² *Foote v. Board of Supervisors* of Chapin, 104 N. Y. 96; s. c., 10 N. E. Noxubee County (1889), 67 Miss. 156. Rep. 141.

³ *Halloran v. Carter* (1891), 13 N. Y.

an honorably discharged Union soldier.¹ *Mandamus* to compel the common council of a village to commence proceedings to remove obstructions in a street claimed to be a public highway will not lie where the person obstructing the street in good faith denies that it is a highway and asserts title thereto.² Where an alternative writ of *mandamus* to compel the officers of a city to canvass the votes cast at an election for a member of the school board shows that illegal votes were cast, but that it is impossible for the officers of the city to separate the legal votes from the illegal votes, or to tell for whom the legal votes were cast, such writ states no cause of action, and a motion to quash should be sustained.³ A motion for a peremptory *mandamus* to compel defendant, as county clerk, to issue to relator a certificate of his election to the office of prosecuting attorney of the county, and to certify the vote to the secretary of State, will be denied, where it appears from the return to the alternative writ that the defendant had in due form canvassed the vote and issued a certificate of the election of relator's opponent, to whom the governor had issued and delivered a commission, after which relator had instituted a statutory contest for the office, which was then pending.⁴

§. 1552. **Premature application — Laches.**— Where the charter of an Illinois village gave the clerk thirty days from the passage of an ordinance in which to post copies of it, a *mandamus* proceeding commenced fourteen days after the passage of an ordinance to compel him to post copies of it was held to be premature, and the writ denied.⁵ Under the statute of Michigan which provides that in case of the temporary disability of one of the elder justices of the peace to act on the township board, "one of the remaining justices," on being notified by such board, shall act thereon, *mandamus* will not lie at the suit of a justice third in order of seniority, in case of such temporary disability, to compel the board to

¹ *Sargent v. Gorman*, 131 N. Y. 191; s. c., 29 N. E. Rep. 946, affirming 14 N. Y. Supl. 481.

² *French v. Common Council of South Haven (Mich.)*, 48 N. W. Rep. 174.

³ *City of Garden City v. Hall (Kan.)*, 26 Pac. Rep. 1021.

⁴ *State v. Smith (Mo.)*, 15 S. W. Rep. 614.

⁵ *Gormley v. Day*, 114 Ill. 185; s. c., 28 N. E. Rep. 693.

seat the relator.¹ An account for services as clerk of a board of county commissioners in South Carolina was not itemized, and was not presented to the board in office when rendered, nor was it presented to or filed with the commissioners during the fiscal year the services were rendered, or the year next thereafter, as required by the statute of that State, but was presented two years afterwards, and marked "Approved." Two years after approval a writ of *mandamus* to pay it was prayed for. It was held that the delay was against the policy of the State, and unreasonable, and the writ should be denied.² A *mandamus* to compel the authorities of a city to allow a railroad corporation to construct its road through the city should be refused while an action to dissolve the railroad corporation is pending.³

§ 1553. **Control of official discretion.**—The Supreme Court of Ohio has held that the expediency of the construction or repair of a bridge, under the statutes of that State relating to bridges, rests in the administrative discretion of the county commissioners, and such discretion cannot be controlled by *mandamus*.⁴ It has been held that *mandamus* will not lie to compel the board of police commissioners of New York, under the statutes of the State providing for pensions to widows of policemen, to place the widow of deceased policemen upon the pension roll, as the laws in that connection especially provide that the board "shall have power in its discretion" to grant such pension, and their discretion is not reviewable by any judicial tribunal.⁵ It was said in a California case that the test for the issuance of a writ of *mandamus* to compel a board, tribunal or officer to do an act which he has refused to do is not whether the refusal involves the exercise of discretion or an exercise of judicial power, but whether it was a determination which the law intended to be final; and if not, whether there is a plain, speedy and adequate remedy in the

¹ *Grondin v. Logan* (Mich.), 50 N. W. Rep. 130.

⁴ *State v. Commissioners of Hamilton County* (Ohio, 1892), 30 N. E. Rep. 785.

² *State v. Knight*, 31 S. C. 81; s. c., 9 S. E. Rep. 692.

⁵ *People v. Martin* (1892), 131 N. Y.

³ *People v. Newton*, 126 N. Y. 656; s. c., 27 N. E. Rep. 370, affirming 11 N. Y. Supl. 782.

196; s. c., 30 N. E. Rep. 60.

ordinary course.³ Applying this principle, a statute which required the auditor of a municipal corporation to examine the proceedings in relation to a street assessment before countersigning a street assessment warrant, and provided that he "must be satisfied that the proceedings have been legal and fair," was construed not to make his determination a final disposition of the matter, and that if the proceedings for assessment were in accordance with the requirements of the statute *mandamus* would issue to compel him to countersign the warrant.⁴

§ 1554. The same subject continued.— *Mandamus* will not lie in New York to a county judge who had appointed a civilian crier of his court, disregarding the application of relator, an honorably discharged Union soldier who was qualified for the position, to compel him to appoint relator to the position. Relator in this case, it was held, had no legal right to the appointment in preference to other soldiers, and the office having been filled the county judge had no longer the power to appoint him.¹ So also has it been held in the same State that the judgment and discretion of the trustees of a village in selecting for appointment a superintendent of public works could not be controlled or reviewed by *mandamus*; and where, in their discretion, they determine that a candidate, not a Union veteran, has superior qualifications to one who is, the court cannot control their action in that respect in such a proceeding.²

³ Wood v. Strother, Auditor &c. (1888), 76 Cal. 545; s. c., 18 Pac. Rep. 766. See, also, as to the rule of discretion, etc., State v. La Fayette County, 41 Mo. 226; Village of Glencoe v. People, 78 Ill. 389; Houghton County v. Auditor-General, 36 Mich. 273.

⁴ Wood v. Strother, Auditor &c. (1888), 76 Cal. 545; s. c., 18 Pac. Rep. 766.

¹ People v. Wendell (1890), 57 Hun, 362; s. c., 32 N. Y. St. Rep. 129; 10 N. Y. Supl. 587. See, also, People v. Saratoga Springs, 54 Hun, 16; People

v. Village of Little Falls, 29 N. Y. St. Rep. 723; People v. Barden, 30 N. Y. St. Rep. 52; People v. Summers, 30 N. Y. St. Rep. 614; Matter of Wortman, 22 Abb. N. C. 137, and Matter of Sullivan, 28 N. Y. St. Rep. 506, distinguished in People v. Wendell, *supra*.

² People v. Village of Saratoga Springs (1889), 54 Hun, 16; s. c., 26 N. Y. St. Rep. 54; 7 N. Y. Supl. 125. See, also, People v. Common Council, 78 N. Y. 33; People v. Board of Education, 2 Abb. Pr. (N. S.) 177; People v. Easton, 13 Abb. Pr. (N. S.) 161;

§ 1555. **The same subject continued—Board of assessment.**—The courts of New York have declared these rules as to *mandamus* in relation to taxes. The court will not by *mandamus* direct a quasi-judicial tribunal what to do. It can only set the same in motion where it has refused to act. Where a board of assessors has acted, for instance, and rendered judgment in assessment proceedings, *mandamus* is not the proper remedy for obtaining a review of the judgment. Such review may be had on a writ of *certiorari*.¹ But *mandamus* is the proper remedy to compel the board of assessors of a city to correct a clerical error in including relator's lot in an assessment, where it is in fact outside of the district of assessment.² And it is proper to join a collector of assessments in a proceeding in such a case to restrain him from proceeding to collect the illegal taxes.³ Nor is the fact that it does not affirmatively appear that the relator had applied to the board of assessors before commencing the proceeding a jurisdictional defect; and the omission is not such substantial error as requires the reversal of an order awarding a *mandamus*. Nor will it defeat the relator's proceeding that the assessment has been confirmed by the common council, and that the statute declares than an assessment when so confirmed shall be "final and conclusive," as such provision will not apply to a case where the assessment is utterly void and illegal and without jurisdiction.⁴

§ 1556. **The same subject continued—Improvement of highways.**—In affirming a denial of a *mandamus* to compel town supervisors to rebuild a bridge, the Supreme Court of Minnesota, on this subject of interference with the discretion and judgment of town boards in such matters by the courts,

People v. Contracting Board, 27 N. Y. 381; *People v. Reardon*, 49 Hun, 430; *People v. Chapin*, 103 N. Y. 635; *People v. Chapin*, 104 N. Y. 100; *People v. Brennan*, 39 Barb. 651; *Howland v. Eldredge*, 46 N. Y. 457.

¹ *People v. Gilson* (1889), 24 Abb. N. C. 125; s. c., 18 Civ. Pro. R. 112; 30 N. Y. St. Rep. 519; 9 N. Y. Supl. 563. See, also, *People v. Common Council*, 78 N. Y. 33.

² *People v. Wilson* (1890), 119 N. Y. 515; s. c., 30 N. Y. St. Rep. 79, aff'g 27 N. Y. St. Rep. 279; s. c., 7 N. Y. Supl. 627. See, also, *People v. Assessors*, 44 Barb. 148; *People v. Olmsted*, 45 Barb. 644; *People v. Supervisors of Niagara*, 4 Hill, 20; *Barhyte v. Shepherd*, 35 N. Y. 255.

³ *People v. Wilson*, 119 N. Y. 515.

⁴ *People v. Wilson*, 119 N. Y. 515.

said:—"It is unnecessary for us to consider under what circumstances, if at all, the court will assume to control these officers in the exercise of the duties imposed upon them in respect to highways, and which from their very nature must be largely discretionary. It is certain that this should not be done unless the particular act the performance of which is sought to be enforced is so plainly and imperatively required that a refusal or neglect to do it cannot be reasonably based upon grounds of discretion. And in such matters other considerations than the need or utility of the particular improvements are to be taken into account, and should be allowed to affect the action of such officers who are charged with the care of the public highways of the town generally. For instance, the amounts of funds applicable to road and bridge purposes which is limited by statute; the extent, nature and relative importance of the improvements which may be deemed to be necessary throughout the town, concerning which, in general, the discretion of the supervisors and not of the courts must be exercised; the probable cost of the particular improvement in question as compared with its usefulness; the question whether the improvement, if made, would probably be permanent or would be speedily destroyed by the elements; and perhaps other considerations must be allowed to affect the judgment and action of the board."¹

§ 1557. The same subject continued — Rebuilding a bridge.—The Supreme Court of West Virginia has declared these rules as to its action in applications for *mandamus* to governing authorities of a county:—*Mandamus* will not lie to control the exercise of the discretion of any court, board or officer, when the act complained of is either judicial or quasi-judicial in its nature. The inferior tribunal may be compelled to act in such case, if it unreasonably neglects or refuses to do so, but if it does act, the propriety of its action, however erroneous and improper, cannot be questioned or controlled by *mandamus*. The writ cannot be permitted to usurp the place of a writ of error or appeal; nor will it lie when there is any other adequate and complete legal remedy. They then held in this particular case that *mandamus* would not lie to compel

¹State v. Town of Somerset (1890), 44 Minn. 549; s. c., 47 N. W. Rep. 163.

the county court, under the statutes of that State, to rebuild a county bridge which had been destroyed, where it appeared that the county court had, under the provisions of another statute, decided to build a bridge across the same river one hundred and ten yards from the site of the former bridge, thereby in effect deciding to change the location of the former bridge. Nor would the court, in such a case in *mandamus* proceedings, inquire into the regularity of the proceedings of the county court establishing such bridge and altering the location of the former bridge.¹

§ 1558. *Petition for mandamus.*—One who is employed under the statute of Ohio to furnish facts and evidence necessary to authorize the county auditor to subject to taxation property improperly omitted from the tax duplicate, who is to receive for his services a percentage of the tax collected on the restored property, has an interest in the matter sufficient to entitle him to maintain a proceeding in *mandamus* against the county auditor to compel him to act upon the facts and evidence furnished by the relator. It is the duty of a county auditor to act under the statute whenever he is “informed or has reason to believe” that property has been improperly omitted from the tax duplicate of the county; and if he declines to act upon reasonable information, a petition in *mandamus*, by a relator who seeks to compel him to act, is sufficient, if it states facts showing that there was reason to believe that property had been improperly omitted from the tax duplicate.² *Mandamus* issued on the relation of a town must be quashed when neither writ nor relation show on their face that the person applying was directed by the electors of the town to make application.³ It has been held in Illinois that in *mandamus* proceedings to compel the levy and collection of a tax to pay bonds of a town held by the petitioner, a failure to demand proper action on the part of the officers of the town is not excused by an averment in the petition that

¹State v. County Court (1890), 33 West Va. 227; Supervisors v. Min-
West Va. 589; s. c., 11 S. E. Rep. 72. turn, 4 West Va. 300.

See, also, Satterlee v. Strider, 31 West
Va. 789; Doolittle v. County Court,
s. c., 26 N. E. Rep. 1052.

28 West Va. 258; Wintz v. Board, 28
³State v. Sauk County, 70 Wis.
485; s. c., 36 N. W. Rep. 396, 398.

the town and its authorities wholly neglected and refused to make any provisions for the payment of the bonds, and that, because of the failure and refusal of the town and its officers to make such provisions, a formal demand would prove unavailing.¹ The petition and alternative writ in such a case to compel the payment of the claim of the contractor should show a demand for such payment.²

§ 1559. Relator's right.—*Mandamus* will only issue to compel action when the right of the relator is clear. He must have a clear legal right to have a service performed by the party to whom he seeks to have the writ directed.³ And where a county treasurer was not justified in paying interest coupons out of any other than specific funds raised for that purpose, and in his hands, until the board of commissioners of the county have issued an order upon him to do so; and where the validity of the bonds and coupons held by the relator were controverted and the county commissioners had not levied a tax for the purpose of their payment nor given an order to the treasurer to pay them, for the lack of a clear showing of right in his petition, the relator was held not entitled to a mandate to the county treasurer to pay his coupons.⁴

§ 1560. The same subject continued.—The rule is well established in Nebraska that where the question is one of public right and the object of the mandate is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such interested in the execution of the laws.⁵ "This rule," though, said the Nebraska court, "applies more particularly to the enforcement of such public duties which the failure to perform will affect the entire community alike," and expressed a doubt as

¹ *People v. Town of Mt. Morris* (Ill.), 27 N. E. Rep. 757.

² *Ingerman v. State*, 128 Ind. 225; s. c., 27 N. E. Rep. 499.

³ *Bailey v. Lawrence County* (S. D., 1892), 51 N. W. Rep. 331. See, also, *People v. Supervisors*, 11 N. Y. 563; *State v. Kavanagh*, 24 Neb. 506; s. c.,

39 N. W. Rep. 431; *Pack v. Supervisors*, 36 Mich. 377; *Fitch v. McDiar-*
mid, 26 Ark. 482.

⁴ *Bailey v. Lawrence County* (S. D., 1892), 51 N. W. Rep. 331.

⁵ *State v. Shropshire*, 4 Neb. 411; *State v. Stearns*, 11 Neb. 104.

to whether it would apply in the case before them, an application for a *mandamus* to the city council to remove a wooden building which had been placed in a certain part of the city with their authority.¹ Justice Cowen, of the Supreme Court of New York, reviewing cases upon this subject, said:—"Most of the cases respect private or corporate rights. Courts or officers or corporations are to be put in motion with a view to enforce some matter of private interest. In such case the title to relief at the suit of relator must appear, and he should present himself as a party, otherwise a mere stranger might obtain a *mandamus* officially and for purposes not at all desirable to the real party. In matters of public right, however, it is otherwise; here the people are the real party, as in the other they are the nominal."² The Nebraska court concluded as follows:—"The distinction between cases where a private person may act as relator to enforce a public duty and where to maintain the action he must show an interest is not very clearly drawn in the cases. The dividing line, however, appears to be, that where private or corporate rights are affected, then the relator must show interest, while if the State is the real party and the relator the mere informer, to procure the enforcement of a mere public duty, then a private individual may become the relator."³

§ 1561. Particular instances illustrating use of *mandamus*.—Where a ditch commissioner has collected assessments levied for the construction of a ditch, *mandamus* will lie to compel him to distribute to the contractor the amount due him for construction, the commissioner's liability being not for breach of contract but for failure in his ministerial duty to lawfully distribute the fund.⁴ *Mandamus* will lie to the mayor of a city to sign a warrant to discharge the indebtedness incurred under a contract for public work which has been awarded by the common council over the veto of the mayor, as the city is bound by it.⁵ Where the amount of a

¹ *State v. City of Kearney*, 25 Neb. 262. could not maintain the action for *mandamus*.

² *People v. Collins*, 19 Wend. 56.

⁴ *Ingerman v. State*, 128 Ind. 225;

³ *State v. City of Kearney* (1888), 25 Neb. 262; s. c., 41 N. W. Rep. 175,

s. c., 27 N. E. Rep. 499.

⁵ *People v. Gleason* (1890), 8 N. Y. Supl. 728.

claim against a county is undisputed, it is the duty of a board of supervisors in New York to allow it, and its refusal to do so is not a mere error of law but a breach of duty which the courts will remedy by *mandamus*.¹ *Mandamus* will lie against a street-railway company to compel it to pave its track according to a valid city ordinance;² and it will issue to compel commissioners to allow claims of jurors for attendance fees.³

§ 1562. The same subject continued.—In a case where it appeared that a remonstrance against the issuance of a license for the sale of intoxicating liquors was duly filed with the licensing board in which causes fatal to the granting of a license were assigned and proof introduced tending to sustain such charges, the board overruled the remonstrance and granted a license to the applicant. The remonstrants having appealed, it was held by the Supreme Court of Nebraska that there being no controversy as to the essential facts above stated, a *mandamus* to compel the board to revoke the license until a decision was rendered on the appeal was fully authorized.⁴ *Mandamus* by a county to compel a former county treasurer to pay over to his successor money due from him as treasurer, being a civil action under the Nebraska Code of Civil Procedure, has been held to be barred unless brought within four years after the expiration of the treasurer's term.⁵ The remedy of a county officer on the refusal of a board of county commissioners to provide office-room for him, where the statute of North Dakota makes it the duty of such board to provide offices for the class of county officers to which he belongs, is to compel the board by *mandamus* to furnish him with an office.⁶ Under the statute of Oregon authorizing the allowance of the writ of *mandamus* on the petition of a "party beneficially interested," the fact that persons are resi-

¹ *People v. Board of Sup'rs*, 56 Hun, 459; s. c., 10 N. Y. Supl. 88.

² *State v. Jacksonville Street R. Co.* (Fla.), 10 So. Rep. 590.

³ *Woffenden v. Board of Sup'rs of Pima County*, 1 Ariz. 237; s. c., 25 Pac. Rep. 647.

⁴ *Byrum v. Peterson* (Neb., 1892), 51

N. W. Rep. 829. See, also, *State v. Bays* (Neb.), 48 N. W. Rep. 270, 271.

⁵ *State v. King* (Neb., 1892), 51 N. W. Rep. 754, following *State v. School Dist. No. 9* (1890), 30 Neb. 520; s. c., 46 N. W. Rep. 613.

⁶ *Cleary v. Eddy County* (N. Dak.), 51 N. W. Rep. 586.

dents and tax-payers of a county entitles them to apply for *mandamus* to compel the county clerk to move the records and keep his office in the town alleged to have been chosen as the permanent county-seat at an election held for that purpose.¹

§ 1563. **Private parties as relators.**—In a case where a resident tax-payer applied for a *mandamus* to compel the mayor and common council of a city to rescind a resolution designating the places of registration and the places for holding the first election in the city under a consolidation act on the ground of the unconstitutionality of that act, it was declared by the Supreme Court of Michigan that it is not the policy of the law to permit private individuals the use of the writ of *mandamus* against public officers, except in cases where they have some special interest not possessed by the citizens generally.² Chief Justice Shaw laid down this rule as follows:—"The general rule of law is that a private individual can apply for a writ of *mandamus* only in a case where he has some private or particular interest to be subserved, or some particular right to be preserved or protected, by the aid of this process, independent of that which he holds in common with the public at large; and it is for the public officers exclusively to apply, where public rights are to be subserved."³ The Supreme Court of Michigan upon the same rule denied a writ of *mandamus* applied for by relator to compel the controller of the original city before the consolidation to receive and file a chattel mortgage on the ground that the relator had no real interest to be subserved, the application being evidently made for the sole purpose of testing the validity of the act of consolidation. The issuing of the writ being discretionary with the court it would only be granted to serve or protect substantial rights.⁴

¹ State v. Grace (Ore.), 25 Pac. Rep. 282.

² Smith v. Mayor &c. of Saginaw (1890), 81 Mich. 123. See, also, People v. Regents, 4 Mich. 98; People v. Green, 29 Mich. 121; People v. Supervisors, 38 Mich. 421; People v. State Auditor, 42 Mich. 422.

³ In re Wellington, 16 Pick. 87, ap-

proved in People v. Inspectors, 4 Mich. 187. See, also, Bobbett v. State, 10 Kan. 9; Turner v. Commissioners, 10 Kan. 16; Scripture v. Burns, 59 Iowa, 70; State v. Eberhardt, 14 Neb. 201; Heffner v. Commonwealth, 28 Pa. St. 108.

⁴ Alderton v. Binder (1890), 81 Mich. 133.

§ 1564. The same subject continued.— *Mandamus* to the officers of a borough in Pennsylvania to compel the erection of approaches to a bridge will not be granted on the petition of a private relator where the substance of the injury alleged is that customers were kept from the relator's mill by want of approaches to the bridge. To justify *mandamus* upon petition of a private relator, he must show a certain specific and legal right in himself for which the law does not afford him a specific legal remedy adequate to redress the injury suffered.¹ *Mandamus* will not lie in Illinois to compel a board of town auditors to audit and allow a claim of commissioners of highways for reimbursement because of a judgment secured against them for illegally digging a ditch by the side of the highway, to the damage of an adjoining property owner.² Where a writ of *mandamus* is issued against the mayor and aldermen of a city, commanding them to pay forthwith a judgment against the city, or to show cause why a peremptory writ should not be issued requiring them to levy a tax for the purpose of paying the same, service upon the mayor alone is sufficient for the purpose of eliciting an answer, as the city is the real party in interest.³ Where a person having judgment against a city has garnished stocks owned by it to an amount sufficient to satisfy his claim, he cannot have a writ of *mandamus* to compel the levy of a tax while the question of the validity of his garnishment is still pending in the Supreme Court on his own appeal.⁴

§ 1565. Acts in excess of officer's powers.— Where proceedings subsequent to the laying out of a highway resulting in the refusal of the town meeting to approve and accept such highway are regular, or if irregular only in matters which do not go to the jurisdiction of the justice before whom an appeal, under the Wisconsin statutes, may be taken from a determination of supervisors as to damages, the validity of the proceedings being thus sustained, no peremptory *mandamus*

¹ Commonwealth v. Westfield Borough (1891), 11 Pa. Co. Ct. R. 369.

³ Hitchcock v. City of Galveston, 48 Fed. Rep. 640.

² Board of Auditors of Town of Cottonwood v. People (1890), 38 Ill. App. 239.

⁴ Hitchcock v. City of Galveston, 48 Fed. Rep. 640.

could issue to compel supervisors to lay out and open the highway, for the reason that the negative vote of the town-meeting would have deprived the supervisors of power to do so.¹ In Michigan a city treasurer cannot proceed by *mandamus* against the cashier of a banking corporation to compel the payment by him of the taxes assessed against owners of shares in the corporation, as the remedy to collect such tax is clear under the statutes.²

§ 1566. Michigan decisions — Control of official discretion.— The constitution of Michigan directs the legislature to provide by law for the removal of any officers elected by a county, township or school district. A statute empowers the governor to remove such officers when he is satisfied from sufficient evidence that they have been guilty of official misconduct or wilful neglect of duty, etc.; but the governor is not to act on such charges until they have been exhibited to him in writing, verified by the affidavit of the party making them that he believes them to be true, “with a statement of the prosecuting attorney of the county that in his opinion the case demands investigation.” It has been held, on an application for *mandamus* to compel a prosecuting attorney to make and attach such statement to a petition for the removal of an alderman of a city, where it appeared that the prosecuting attorney had informed the persons signing the petition that in his opinion no investigation was necessary, that the court had no jurisdiction.³ Where the governor undertook to appoint a member of the board of county auditors when there was no vacancy, and the sheriff of the county took sides with the governor’s appointee and attempted to install him into the office of county auditor by taking the official books from the chairman of the board of auditors, and by placing them in the possession of the governor’s appointee, *mandamus* will issue against the sheriff for their restoration to the chairman of the board.⁴ And where the public exigencies demand a speedy determination of the title to the office, which is plainly

¹State v. Varnum (Wis., 1892), 51 N. W. Rep. 958.

²Eyke, City Treasurer, v. Lange (Mich., 1892), 51 N. W. Rep. 680.

³McLaughlin v. Burroughs (Mich.), 51 N. W. Rep. 283.

⁴Lawrence v. Hanley (Mich.), 47 N. W. Rep. 753.

in the auditor whose term is about to expire, the question should be settled in the *mandamus* proceeding by the chairman of the board against the sheriff, who is in fact only a nominal party, and who really represents the governor's appointee, without compelling the parties to resort to the more dilatory proceedings by *quo warranto*.¹

§ 1567. Restoration to office.—The New Jersey Supreme Court have, in a well discussed and considered case, in awarding a peremptory *mandamus* to restore a person removed from office, declared these rules as to remedies:—When an office is filled *de facto* by a person claiming it under color of right, the proper remedy to test the claimant's title is *quo warranto* and not *mandamus*.² An office is deemed to be full *de facto* whenever a person elected has been admitted to it, notwithstanding the election may on legal grounds turn out to be invalid; provided such election is consistent with an honest misapprehension of the law and not evidence of a palpable disregard of its provisions. Where a *mandamus* is applied for to compel a corporation to restore relator to an office to which he is *prima facie* entitled, the incumbent is not a necessary party to the allowance of a peremptory *mandamus*. When a relator in office *de jure et de facto* is interfered with by one whose lack of title *de jure* is *res judicata*, *mandamus* and not *quo warranto* is the proper remedy.³

§ 1568. To compel performance of judicial functions.—It is settled in Indiana that the writ of *mandamus* will not

¹ Lawrence v. Hanley (Mich.), 47 N. W. Rep. 753.

² State v. Atlantic City (1890), 52 N. J. Law, 332. See, also, Rex v. Mayor of Colchester, 2 Term R. 259; Rex v. Mayor of York, 4 Term R. 699; Rex v. Mayor of Oxford, 6 Ad. & El. 349.

³ State v. Atlantic City, cited in the preceding note. See, also, Rex v. Lisle, Andr. 163; s. c., 2 Str. 1090; Frost v. Mayor of Chester, 5 El. & B. 531; Rex v. Bankes, 3 Burr. 1452; Rex v. Holmes, H. 9; Rex v. Mayor of Cambridge, 4 Burr. 2008; Shortt on Mandamus, 122; Drake v. New York, 3

Johns. Cas. 79; Dolan v. Lane, 55 N. Y. 217; Matter of Gardner, 68 N. Y. 467; People v. Ferris, 76 N. Y. 326; Ellis v. Bristol, 2 Gray, 370; Conlin v. Aldrich, 98 Mass. 557; Dew v. The Judges, 3 Hen. & Mun. 1; Hoboken v. Gear, 27 N. J. Law, 265; McDermott v. Miller, 45 N. J. Law, 251; Bradshaw v. Camden, 39 N. J. Law, 416; Henry v. Camden, 43 N. J. Law, 335; Mason v. Mayor of Patterson, 35 N. J. Law, 190; Lewis v. Jersey City, 51 N. J. Law, 240; People v. Scrugham, 20 Barb. 202.

issue against a board of commissioners of a county, when acting in a judicial capacity, to direct the performance of a judicial duty in any particular mode or to render any particular judgment. Where a board of commissioners refuses to act, however, in a matter upon which it is their duty to take some action, the writ will issue to compel action, but will not dictate the kind of judgment to be rendered.¹ So, where a board of county commissioners submitted the question of purchasing a certain toll road to the electors of the townships through which the road ran, at which election a majority of such voters declared in favor of the purchase, and the board afterwards refused to make an order for such purchase, it was held that *mandamus* would not lie to compel the board to make such an order, its action being a judicial one.² Nor would it lie in this case because the party applying for it had an adequate legal remedy in his right of appeal from the action of the board to the circuit court.³

§ 1569. The same subject continued.— *Mandamus* will issue in a proper case to compel a county board to act upon a claim against the county, where final action has been refused; but in a proceeding in *mandamus* the court will not determine the validity of any offset set up by the county.⁴ The court said: — “The purpose of this action is not to compel the allowance of relator’s account, but merely to require respondents to take final action thereon. Whether such account shall be allowed in whole or in part or be entirely rejected cannot be adjudicated in a proceeding by *mandamus*, but must be determined in the first instance by the county board when they come to take final action upon the claim.”⁵

¹ *State v. Board of Comm’rs* (Ind., 1892), 30 N. E. Rep. 892. See, also, *State v. Board of Comm’rs*, 45 Ind. 501; *State v. Board of Comm’rs*, 63 Ind. 497.

² *State v. Board of Comm’rs* (Ind., 1892), 30 N. E. Rep. 892. See, also, *Gilson v. Board of Comm’rs*, 128 Ind. 65; s. c., 27 N. E. Rep. 235; *White v. Burkett*, 119 Ind. 431; s. c., 21 N. E. Rep. 1087.

³ *State v. Board of Comm’rs* (Ind., 1892), 30 N. E. Rep. 892. See, also,

Marshall v. State, 1 Ind. 72; *Board v. Hicks*, 2 Ind. 527; *State v. Board of Comm’rs*, 25 Ind. 210; *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *Platter v. County of Elkhart*, 103 Ind. 360; s. c., 2 N. E. Rep. 544; *City of Logansport v. La Rose*, 99 Ind. 117; *Padgett v. State*, 93 Ind. 396.

⁴ *State v. Slocum* (Neb., 1892), 51 N. W. Rep. 969.

⁵ *State v. Slocum* (Neb., 1892), 51 N. W. Rep. 969.

§ 1570. To compel payment of judgment.— On an application for a writ of *mandamus* to compel the city of New Orleans to pay a judgment regularly obtained against it, such judgment was held conclusive as to the city's liability; and no defense can be made on the ground that the debt was not paid out of the revenues of the year for which it was contracted in accordance with the statute providing that no municipal corporation shall expend any money in any year in excess of the actual revenue for that year, and that the revenue for each year shall be devoted to the expenditures thereof.¹ It was also held that the legislature having declared that a ten-mill tax is sufficient to provide for the unbonded expenditures of the city of New Orleans, it is not within the discretion of the council to exhaust the entire revenue with one class of disbursements and leave others to accumulate; therefore a writ of *mandamus* will issue to compel it to pay a valid judgment against the city, either out of surplus revenues for the current year, or, if there is no available surplus, to include it in the budget for the ensuing year.² And on such an application for a writ of *mandamus* the fact that other judgments besides the relator's have been recorded under the Louisiana statute did not require that the writ of *mandamus* applied for by the relator should direct all the judgments to be paid in their proper order, since the court will not undertake to enforce the rights of persons who do not invoke its aid.³

§ 1571. The same subject continued — Compelling audit of claims.— A board of supervisors being the court of original jurisdiction to determine the validity of claims against a county, in such determination it acts judicially.⁴ Its conclusion, if it has properly proceeded, can only be reviewed by a writ of *certiorari*.⁵ The court may by *mandamus* direct the board

¹ *City of New Orleans v. United States*, 49 Fed. Rep. 40, following *United States v. New Orleans*, 98 U. S. 395. *People v. Stocking*, 50 Barb. 573; *People v. Barnes*, 114 N. Y. 317; s. c., 20 N. E. Rep. 609; 21 N. E. Rep. 739; *People v. Supervisors*, 21 How. Pr. 322–323.

² *City of New Orleans v. United States*, 49 Fed. Rep. 40.

³ *City of New Orleans v. United States*, 49 Fed. Rep. 40.

⁴ *Brown v. Green*, 46 How. Pr. 306;

⁵ *People v. Supervisors*, 51 N. Y. 442; *People v. St. Lawrence County*, 25 Hun, 131, 135; *People v. Barnes*, 114 N. Y. 317; s. c., 20 N. E. Rep.

of supervisors to properly proceed to audit a claim, but it cannot by *mandamus* direct the board to allow a claim upon which it must pass judicially.¹ Where a claim has been presented to a board of supervisors in New York, and it has been informally examined without the swearing of witnesses, or the giving of an opportunity to claimant to produce witnesses or present his legal rights by counsel, *mandamus* will lie to the board to audit the claim, on the ground that they have not judicially investigated the claim.² If such a claimant, after the alternative writ of *mandamus* has been obtained, accept the order of a board for the sum at which it had previously assumed to audit his claim, and draws the money thereon, he is estopped from making any further demand on the claim, though at the time of accepting it he stated that he did it without prejudice to his rights in the *mandamus* proceedings, and the supervisor who delivered the order assented to the condition.³

§ 1572. Audit of claims continued.— *Mandamus* will not lie to a board of county supervisors to re-audit an account where a previous board has considered the whole claim on its merits, and in good faith exercised its judgment, and rendered a decision as to the amount which should be allowed.⁴

609; 21 N. E. Rep. 739; Hyatt v. Bates, 35 Barb. 308; s. c. on appeal, 40 N. Y. 164.

¹ People v. Chapin, 104 N. Y. 96; s. c., 10 N. E. Rep. 141.

² People v. Board of Supervisors (1891), 15 N. Y. Supl. 748.

³ People v. Board of Supervisors, cited in the preceding note. See, also, People v. Supervisors, 33 Hun, 305; People v. Supervisors, 3 How. Pr. (N. S.) 243; Chase v. County of Saratoga, 33 Barb. 603.

⁴ People v. Board of Supervisors of Cayuga County (1891), 16 N. Y. Supl. 254. The court said: — "There is no statute law, however, requiring [a board of supervisors] to review decisions of prior boards in reference to claims that have been once properly considered and audited against

the county. There being no law requiring them to perform such an act, they cannot be compelled by *mandamus* to do what the law does not require them to do. The examination of the account by the board may be regarded and treated in the nature of a trial, and its allowance or disallowance is the decision of that tribunal; and when the board has properly exercised that jurisdiction which the law imposes in auditing claims against the county, the sufficiency of the evidence or the injustice of the decision cannot be reviewed or inquired into by *mandamus*, nor will a *mandamus* lie to compel the board to reach any different decision. While the writ of *mandamus* is an appropriate remedy to compel public officers, judicial as

§ 1573. **Payment of claims and warrants.**— If the county commissioners refuse to pay a claim when there are funds in the county treasury liable thereto, the remedy is by *mandamus*, and not by actions for damages against them personally.¹ If there is no money in the treasury of a municipal corporation for the payment of a warrant, a *mandamus* to its governing board to draw a warrant upon its treasurer should be denied.² A peremptory *mandamus* should not issue to compel a board of town auditors to audit a claim of a commissioner of highways for a judgment for legal services recovered against and paid by him in that capacity, where the record and pleadings fail to show that the services in question were necessary and proper, and that the board had passed upon the same.³ The statute of Texas provides that the amount due to jurors and bailiffs for services in criminal cases shall be paid by the county treasurer upon the certificate of the district or county court in which such services were rendered. Another statute provides that such certificates shall be transferable by delivery. It has been held that it not being the duty of the clerk of a district or county court to pass upon the validity of a transfer by a juror or bailiff of such a claim against a county, the clerk could not be compelled by *mandamus* to issue to an assignee of such claim the certificate

well as ministerial, to act, where the act is ministerial the officers may be compelled to perform the act according to law; but where the officers are vested with judicial or discretionary power to decide a question upon a disputed state of facts, they cannot be compelled by *mandamus* to decide in a particular way. . . . If, however, the statute prescribes the sum to be received for [services rendered the county], or if the sum is fixed by a binding contract, the board is bound to allow the bill according to the requirements of the statute or contract. They have no discretion over it, and if they refuse to allow the claim a *mandamus* will lie to compel them to allow it. Where a claim is disallowed by the board

because the bill was not made out and presented in proper form, or for any other reason not involving a decision upon the merits, the court might, in such a case, compel a subsequent board by *mandamus* to again consider it and audit the account."

¹ Hunter v. Mobley, 26 S. C. 192; s. c., 1 S. E. Rep. 670.

² Board of Improvement v. McManus (1891), 54 Ark. 446. See, also, People v. Tremain, 17 How. Pr. 142; Commonwealth v. Comm'rs, 6 Binn. 5; Commonwealth v. Comm'rs, 1 Whart. 1; Clay County v. McAleer, 115 U. S. 616.

³ People v. Case (1892), 19 N. Y. Supl. 625. The remedy is by *certiorari*.

designated in the said statute, although evidencing only the right of the assignor to compensation.¹

§ 1574. To compel public boards to reverse their decisions.—The Supreme Court of Michigan, as to writs of *mandamus*, said:—“It is within the province of courts to restrain public bodies and officers of the municipal divisions of the State from exceeding their jurisdiction, and to require them to perform such specific duties as the law imposes upon them.² And the writ has often been used to compel such bodies or officers to reverse their decisions.³ The writ, however, is a discretionary one, and will not be awarded in all cases, even where a *prima facie* right to relief is shown. We must have regard to the exigency which calls upon us to exercise our discretion, the nature and extent of the wrong or injury which would follow its refusal, and other facts which have a bearing upon the particular case.”⁴ Acting upon this principle the court declined to grant a writ of mandate to compel the mayor of a city to reverse his decision in declaring a resolution authorizing the purchase of certain land carried and to declare it lost, inasmuch as it appeared upon the records that the resolution was not carried, and that therefore no valid contract could be entered into for such purchase for want of authority on the part of the mayor and clerk, and that no injury could arise to the city on account of the action complained of.⁵

§ 1575. To compel subordinate officials to recognize board.—The Supreme Court of the United States has held that on petition for a writ of *mandamus* by a board of county commissioners to compel the clerk of the board to recognize them as such and to perform his duties, the clerk’s answer that petitioners were not duly elected commissioners, but that other persons were, does not so involve their title to office as that the writ should be refused on the ground that there is

¹ *Pace v. Ortiz* (1889), 72 Tex. 437; s. c., 10 S. W. Rep. 541.

² *Attorney-General v. Board*, 64 Mich. 607; *Coll v. Board*, 83 Mich. 367.

³ *People v. Supervisors*, 3 Mich. 475; *People v. Auditors*, 13 Mich. 233.

⁴ *Tennant v. Crocker* (1891), 85 Mich. 328, 339.

⁵ *Tennant v. Crocker* (1891), 85 Mich. 328.

an adequate remedy at law in *quo warranto* proceedings.¹ The court said: — “This was not a proceeding to try the title to office. The direct purpose and object was to compel the defendant to discharge his duties as clerk, and to forbid him to assume to determine any contest between rival commissioners. It is true the pleadings disclose the existence of a contest between these petitioners and other parties, and it is true that the answer would tend to show that the others were the commissioners *de facto*; but that was a question of fact to be determined by the court hearing this application, and it is, as must be assumed from the decisions, found that these petitioners rather than their contestants were the commissioners *de facto*. It was proper for it then to issue a *mandamus* to compel the defendant to recognize them as the commissioners of the county, and this irrespective of the question whether or no the petitioners were also commissioners *de jure*.”²

§ 1576. Removal of obstructions in streets.— It has been held in Pennsylvania that *mandamus* is not the appropriate remedy to compel a borough to remove poles erected by a street railway company upon the sidewalks of a street. Indictment would seem to be the proper remedy. Nor has the court power by *mandamus* to revise or reverse the exercise of the discretion of municipal authorities granting permission to place poles on the sidewalks.³ On the power to revise the decision of the authorities the court said:—“We have no such power. We might have compelled [the borough authorities] to consider the question; but we could not then have directed their conclusions, nor can we revise them after they have been reached. As long ago as 1812, and frequently since, the Supreme Court of this State has held that ‘when a person or body is clothed with judicial, deliberative or discretionary powers and he or it has exercised such powers ac-

¹ Delgado v. Chavez (U. S.), 11 So. Ct. Rep. 874; affirming s. c., 25 Pac. Rep. 948.

² Delgado v. Chavez, cited in the preceding note. See, also, Putnam v. Langley, 133 Mass. 204; Rex v. Harris, 3 Burrow, 1422; Page v. Hardin,

8 B. Mon. 648; State v. City of Atlantic City, 52 N. J. Law, 332; s. c., 19 Atl. Rep. 780; Williams v. Clayton, 6 Utah, 86; s. c., 21 Pac. Rep. 398.

³ Commonwealth v. West Chester (1889), 9 Pa. Co. Ct. Rep. 542.

cording to its discretion, *mandamus* will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, although in fact the decision may have been wrong, provided such decision was devoid of fraud or corruption.'"¹ A complaint in an action to compel a city by *mandamus* to remove an obstruction from an alley placed therein by a railroad company with the consent of the city must in order to be sufficient make it affirmatively to appear that an unlawful use is made of the alley.²

§ 1577. The same subject continued.—A railroad company can be compelled by mandatory injunction to restore a public street which it had torn up in constructing its crossing to its former state of usefulness where such restoration was a statutory condition of the right to build the crossing; and the injunction could not be objected to on the ground that the city might repair the injury and recover damages of the railroad company.³ It is not necessary that the city establish a permanent grade of the street before calling on the railway company to repair, as the company needed only to repair the injury which it had done.⁴ Allegations in the petition of the city for this relief against a railway company that the latter has obstructed a street by raising an embankment in many places therein eighteen inches above the former grade; that it is impracticable to drive over the railroad between one

¹Commonwealth v. West Chester, 9 Pa. Co. Ct. Rep. 542. See, also, Griffith v. Cochran, 5 Binn. 87; Commonwealth v. Perkins, 7 Pa. St. 42; Commonwealth v. Mitchell, 82 Pa. St. 350; Runkle v. Commonwealth, 97 Pa. St. 328; Dechert v. Commonwealth, 113 Pa. St. 241.

²State v. City of New Albany (1890), 127 Ind. 221. The court said:—"A *mandamus* is a commandatory writ. It lies where there is a clear legal right in the relator, a corresponding duty in the defendant and a want of any other adequate, appropriate and specific remedy. It is invoked for the enforcement of duties to the public by officers and others who either

neglect or refuse to perform them. He or they who demand it must in all cases establish a specific legal right to it as well as show the duty of the defendants to do what is demanded, and demonstrate the want of any legal remedy." Commonwealth v. Council of Pittsburgh, 34 Pa. St. 496; Commonwealth v. Comm'rs of Allegheny County, 37 Pa. St. 279.

³City of Oshkosh v. Milwaukee & C. Ry. Co. (1889), 74 Wis. 534; s. c., 43 N. W. Rep. 489. See, also, Jamestown v. Chicago & C. R. Co., 69 Wis. 648.

⁴City of Oshkosh v. Milwaukee & C. Ry. Co., 74 Wis. 534.

end of a long block and another; that it is impossible to turn with an ordinary team on the street or to drive in and out of the lots and premises with teams and heavy loads, it was held sufficiently showed an obstruction of the street to entitle the city to an injunction.¹

§ 1578. The same subject continued — Control of discretion.— The Supreme Court of Illinois has held that the writ of *mandamus*, since the revision of the statutes relating to that remedy, is only issued in a clear case and in the discretion of the court. When it is doubtful whether the act sought to be coerced will or will not make the party liable for a trespass, the court, in the exercise of its discretion, will refuse the writ. The ground that there is another remedy equally convenient and effectual, and therefore *mandamus* will not lie, has been abrogated by these statutes in relation to *mandamus*. In case of an abuse in the exercise of a discretionary power, so that injustice will result, it is admissible that the exercise of the power shall be controlled by *mandamus*. In a case of an application for *mandamus* to compel highway commissioners to remove an obstruction in a highway, they held that the most recent statute as to highways in that State had given to the commissioners of highways, after having given reasonable notice to the person obstructing the highway to remove the obstruction, to remove the same and to recover the cost of such removal from the party so obstructing the same, and that the provisions “that the commissioners, after having given reasonable notice, etc., may remove any fence or other obstruction,” etc., were intended to impose upon the commissioners the imperative duty of removing obstructions from the public highway. But while it was their imperative duty, they have a discretion as to the length of the notice they may first give the offending party to remove the same. And it is as much their duty to exercise this incidental discretion for the public good by determining what is a reasonable notice in the particular case, and by giving it, as it is to remove the obstruction. The word “may” in a statute, they held, will be construed to mean “shall” whenever the rights of the public or third persons depend upon the exercise of the power,

¹ City of Oshkosh v. Milwaukee &c. Ry. Co., 74 Wis. 534.

or the performance of the duty to which it refers; and such is its meaning in all cases where the public interests and rights are concerned, or a public duty is imposed upon public officers, and the public or third persons have a claim *de jure* that the power shall be exercised.¹

§ 1579. Discretion to remove obstructions further considered.—The issuing of a peremptory *mandamus* rests in the sound discretion of the court.² The issue of a writ to compel an officer having jurisdiction in the matter to remove obstructions in a street can be properly prayed for only on the ground that their removal is part of the public duty of such officer, and that the improper failure to perform that public duty works special damage to the relator.³ In a case where it was sought to compel the commissioner of public works of the city of New York to remove structures erected by an elevated railway company in the streets, it was held that *mandamus* was not the proper remedy, the alleged obstructions being erected by a corporation under color of legislative authority in a comparatively uninhabited part of the city and causing no present substantial loss to the relator.⁴

§ 1580. To appoint school trustees.—It has been held in Texas that parents of children within the school ages, residents in a school district, may prosecute a suit for *mandamus* against the county judge, who, under the statutes of that State, is the administrator of the public school finances, as well as certain other matters connected with the public schools, for refusal to appoint trustees for the district, when it is his duty under the school laws to do so. To a petition for a peremptory *mandamus* to compel a county judge to appoint

¹ *Brokaw v. Comm'rs of Highways* (1889), 130 Ill. 482, reversing the court below, which had dismissed the petition for *mandamus*. See, also, *Kane v. Footh*, 70 Ill. 587; *Fowler v. Pirkins*, 77 Ill. 271; *Schuyler County v. Mercer County*, 4 Gilm. 20; *Village of Glencoe v. People*, 78 Ill. 382; *Tapping on Mandamus* (Am. ed.), 66; *People v. Weber*, 86 Ill. 283.

² *People v. Supervisors*, 11 N. Y. 563; *People v. Hyatt*, 66 N. Y. 606; *People v. Constructing Board*, 33 N. Y. 382; *People v. Croton Aqueduct*, 49 Barb. 259.

³ *People v. Supervisors*, 11 N. Y. 563; *People v. Hyatt*, 66 N. Y. 606; *People v. Constructing Board*, 33 N. Y. 382; *People v. Croton Aqueduct*, 49 Barb. 259.

⁴ *People v. Manhattan Ry. Co.* (1888), 20 Abb. N. C. 393.

trustees for a school district formed by the county commissioners from part of another district, the judge cannot answer that the action of the commissioners' court was impolitic. The county judge may be, in such proceedings, compelled to appoint trustees and to apportion the school funds to a newly ordered school district. The court also held that the order to him to apportion the school funds *pro rata* to the new district, including funds realized from a special school tax assessed upon property in the original district, was proper.¹

§ 1581. Apportionment, etc., of school moneys.— *Mandamus* is the appropriate remedy to compel county commissioners to pay over without diminution the full amount of taxes levied for school purposes.² Town auditors were authorized by a New York statute to apportion certain town funds among the school districts of the town in the same manner "as the public school moneys of the State are apportioned." After the town auditors in this case had made such apportionment, the previous apportionment of the State moneys was, on appeal to the superintendent of public instruction, declared erroneous, and ordered to be corrected; and on a subsequent appeal to him, he ordered the town auditors to correct their apportionment to correspond therewith. It was held that, even if the superintendent had jurisdiction to review the action of the town auditors, they should not be compelled by *mandamus* to make such correction, as their statutory power to apportion the town moneys as the State moneys were in fact apportioned did not extend to the correction of a previous apportionment, it appearing, also, that the right of the relators was doubtful, as such corrected apportionment was alleged to be informal, irregular and false.³ A school district entitled under the laws of Nebraska by reason of being within the limits of a village to its proper share of the moneys received by the corporate authorities of such incorporated village for liquor licenses, upon a refusal to pay on demand by the village treasurer may by *mandamus* compel him to pay the same.⁴

¹ Porter v. State (1890), 78 Tex. 591; s. c., 14 S. W. Rep. 794.

² Board of County School Comm'rs v. Gantt (Md.), 21 Atl. Rep. 548.

³ People v. Board of Town Auditors, 12 N. Y. Supl. 165.

⁴ State v. White (1890), 29 Neb. 288. It was urged that the remedy was to

In *mandamus* against the trustees of a school district to compel the restoration of a pupil, the validity of the organization of the district cannot be called in question.¹

§ 1582. To restore school funds.—Where a common council which had no control over a school fund, by resolution directed the treasurer of a town to retain a portion of a school fund and apply it to the payment of certain special assessments against school property,* such resolution was held a nullity; and where the treasurer had applied a portion of this fund, as directed, against the protest of the board of education, it was held that a *mandamus* should issue directing him to restore it to the school account. The charter of the town in this case provided that the money voted by the people to be raised for school purposes should be paid by the collector of taxes directly to the town treasurer and by him should be paid out upon warrants signed by the president of the board of education.² But in the absence of any duty on the part of the board of council in respect to that fund, no writ of *mandamus* would go to them compelling any action relating to it.³

§ 1583. To compel signing of teacher's warrant.—A peremptory *mandamus* will issue to compel the comptroller of a city to countersign a teacher's warrant in payment of the teacher's services for one month, where the board of commissioners have contracted with the teacher for a year, beginning at a stated time, "provided there be sufficient money properly set apart to pay . . . for that period, and if there be not sufficient money for that purpose, for such portion of that period as the money so set apart shall be sufficient," there being money in the treasury of the city appropriated to the payment of salaries of school teachers. The Court of Appeals of New York, in rendering this opinion, held that provision in the statute that the board of school commissioners of this city shall not contract to pay teachers a

bring action against the village. See, Dixon County (Neb.), 48 N. W. Rep. also, *Grable v. Roderick*, 23 Neb. 505; 393.

State v. Wilcox, 17 Neb. 219; *School District v. Saline County*, 9 Neb. 405. ²*State v. Board of Council* (1889), 52 N. J. Law, 69.

¹*State v. School Dist. No. 1 of* ³*State v. Board of Council, supra*, cited in the preceding note.

gross amount in excess of that allowed by the board of estimate for the school year did not operate, so long as the board kept within such restriction, to prevent them from contracting with teachers at a rate which would exhaust the appropriation made in pursuance of such estimate before the end of the school year, the effect thereof being merely to shorten the school year and not to exceed the appropriation.¹ Under the by-laws of the board of education of New York city adopted in pursuance to the consolidation act, which by-laws provide that the salaries of school teachers shall be paid on pay-rolls to be approved and certified by the school trustees and inspectors, and then audited and certified by the board of education and finance department of the city, *mandamus* will not lie to the board of education to pay the salary of relator, a teacher alleged to have been wrongfully dismissed; relator's only remedy being to have his name put on the pay-roll that his salary might be paid in the regular way.²

§ 1584. To dissolve an injunction against a city.—In granting a writ of *mandamus* to compel a circuit judge to dissolve an injunction restraining a city from making a contract for the lighting of its streets, the Supreme Court of Michigan declared these rules:—The circuit court has no jurisdiction to restrain the exercise of corporate powers by a city, unless the action complained of is beyond its legal discretion. A city (as a corporation) is a single legal person, and in proper cases subject to legal coercion; and where so liable, it is not irregular to restrain any city functionary who is engaged in carrying out the illegal purpose. Whether *mandamus* is the proper remedy to remove an injunction which ought not to stand depends entirely on the conditions of its issue. Usually, if the mischief can be as well settled by appeal, that is the proper resort. Where a preliminary injunction operates in such a way as to do violence to vested rights and interests, and to prevent the proper authorities from exercising their legal functions, it is such an invasion of

¹ *People v. Coffee*, Comptroller (1892), 131 N. Y. 569; s. c., 35 N. E. N. Y. Supl. 308.
² *People v. Board of Education*, 15 Rep. 64, affirming 62 Hun, 86; 16 N. Y. Supl. 501.

right as entitles the aggrieved parties to a prompt redress, which is better for the public peace and order than encouraging an open disregard of the legal tribunals where it can be avoided. While the action of an inferior court, within its discretion, is to be reached by other appellate process, yet, when the action complained of is beyond any proper discretionary power, or is an abuse of discretion which cannot be justified on legal principles, the court may and will interfere by *mandamus*, if there is urgency or pressing occasion to do so.¹

§ 1585. To compel approval of official bond.— *Mandamus*, it has been held in Indiana, will lie to compel a county auditor to accept and approve the official bond of a township trustee duly elected.²

§ 1586. Approval of bonds continued.— Where a board of county commissioners in Colorado adjudge the bond of a justice of the peace insufficient and refuse to approve the same, *mandamus* will not lie to control the board's discretion in the matter, the board being authorized by the statutes of that State to judge of the sufficiency of official bonds of that char-

¹ *City of Detroit v. Hosmer*, Circuit Judge (1890), 79 Mich. 384. See, also, *Railway Co. v. Circuit Judge*, 31 Mich. 456; *Railway Co. v. Circuit Judge*, 44 Mich. 479; *Van Norman v. Circuit Judge*, 45 Mich. 204; *MacLean v. Circuit Judge*, 52 Mich. 257; *Iron Works v. Speed*, 59 Mich. 272.

² *Copland v. State* (1890), 126 Ind. 51; s. c., 25 N. E. Rep. 866. See, also, *Gulick v. New*, 14 Ind. 93, in which it was held that *mandamus* will lie to compel a county clerk to approve the bond of a sheriff. In *Board of Comm'rs of Knox County v. Johnson* (1890), 124 Ind. 145, the same court distinguish *Gulick v. New*, *supra*, by saying:—"The decision in that case may be sustained upon the ground that the clerk was a ministerial officer and that no appeal could be taken from

his action in refusing to approve the bond. But where the officer is a judicial one and there is a right of appeal, the question is essentially different." They then say:—"There is, however, a decision directly declaring that mandate will lie to compel a board of commissioners to approve the bond of a public officer or show cause for refusing to approve it." *Board &c. v. State*, 61 Ind. 379, the soundness of which decision the court doubted. Cf. as to the duty in such cases being a judicial and not a ministerial one, *State v. Dunnington*, 12 Md. 340; *Ex parte Harris*, 52 Ala. 87; s. c., 23 Am. Rep. 559; *Thompson v. Justices*, 3 Humph. (Tenn.) 233; *Swan v. Gray*, 44 Miss. 393; *County of Bay v. Brock*, 44 Mich. 45.

acter.¹ *Mandamus* will not lie to compel county commissioners to approve a bond of a county school superintendent where the ground of their refusal is that the bond was not filed within the time provided by the statute, and that therefore the office is vacant.² Nor will the writ lie to compel the approval of a liquor bond which has been refused because of the insufficiency of the sureties, where it appears there was evidence to warrant such a finding.³ *Mandamus* has been held to lie to compel a village to review, and if sufficient to approve, a bond duly filed, as a preliminary step to the granting of a license to keep a saloon before the passage of an ordinance suppressing saloons.⁴

§ 1587. To restore removed officials.—In ordering that a *mandamus* be made peremptory to compel the mayor of a city to restore to office certain persons who had been removed by him, the Supreme Court of Louisiana has declared these rules:—*Mandamus* may be directed to corporations established by law to compel them to receive and to restore to their functions such of their members as they shall have refused to receive, and whom they shall have removed without sufficient cause. The district courts have jurisdiction and power to examine into and decide whether an officer of a municipal corporation has been removed from office on charges that are sufficient in law to warrant removal proceedings, and whether the proceedings have been legally conducted, in case the law authorizes a removal only for due cause. During the pendency of a *mandamus* proceeding to test the validity of an act of removal from office of relators by the mayor, commissions intermediately issued to other persons cannot be given the effect of extinguishing relators' cause of action. In case charges have been preferred against several municipal officers at one and the same time, who are tried together, and are removed from office by one and the same order, they have suf-

¹ Board of County Comm'rs v. Crotty, 9 Colo. 318; s. c., 12 Pac. Rep. 151. ³ Post v. Sparta, 63 Mich. 323; s. c., 29 N. W. Rep. 721.

² Comm'rs of Knox County v. Johnson, 124 Ind. 145; s. c., 24 N. E. Rep. 148. ⁴ Warner v. Village of Lawrence, 62 Mich. 251; s. c., 28 N. W. Rep. 844.

Board v. State, 61 Ind. 379, distinguished.

ficient identity and mutuality of interest to authorize them to be joined as relators in one and the same *mandamus* proceeding.¹

§ 1588. To compel execution of tax deed.—By the statute of Nebraska the production of a tax certificate to the treasurer of a county, together with proof that proper notice of the expiration of the time to redeem has been legally given, are conditions precedent to the right of the treasurer to execute a tax deed. The provisions of the statute as to the time and manner of giving notice are mandatory and must be substantially complied with, or the holder of such a tax certificate will not be entitled to a treasurer's deed for lands purchased at a tax sale. So the court in Nebraska sustained the dismissal of a proceeding in *mandamus* to compel a county treasurer to execute a tax title, the petitioner not having complied with the requirements of the statute, as a peremptory *mandamus* will only issue against a public officer to enforce the performance of a present duty imposed upon him by law where he is in default in the discharge of such duty.² And *mandamus* will not lie to compel a county treasurer to issue tax deeds of land for which a relator has paid, if the return of the treasurer shows that the money paid was tendered back to the relator the same day and accepted by him, and that the lands had been conveyed to other persons before relator again tendered the money under the Michigan statute relating to tax sales and titles.³ But the State land tax book being a public record, it has been held in Michigan that a dealer in tax titles has the same right as any other citizen to inspect and examine it, and may enforce his right, if necessary, by a writ of mandate.⁴

¹ *State v. Shakspeare* (1891), 43 La. Ann. 92; s. c., 8 So. Rep. 893, in which the court held that if upon an examination of the charges which were preferred against certain police commissioners, it was found that they did not in law amount to malfeasance in office, the order of the mayor of the city of New Orleans re-

moving them from office would be revoked, and they would be restored to their functions and franchises.

² *State v. Gayhart* (Neb., 1892), 51 N. W. Rep. 746.

³ *Aitcheson v. Huebner* (Mich., 1892), 51 N. W. Rep. 634.

⁴ *Aitcheson v. Huebner* (Mich., 1892), 51 N. W. Rep. 634.

§ 1589. **To compel approval of contract.**— Upon application for a writ of *mandamus* to a city council to compel an approval of a contract, where it was determined that the objection upon which the council had rejected relator's contract was merely technical and without foundation, still, as the contract had been let to another party, and the work done, the court, in its discretion, declined to grant the writ.¹ In a similar case the New York Court of Appeals said:— "As an action may be maintained against the city, if the right of the relator is clear and unquestioned, according to the authorities to which we have referred, he must be left to pursue his remedy in that forum. If his claim is not well founded and his right to the same is not entirely clear, then he occupies no better position; and even if he had no other remedy besides the writ of *mandamus*, the application might very properly be denied upon that ground."² A board of public works of a city having made a contract for paving a street pursuant to instructions from the common council, the common council may reject the contract; and having done so, in the absence of fraud or violation of law in respect to the lowest bidder, *mandamus* will not issue on relation of the contractors to enforce the contract.³

§ 1590. **To a county treasurer to refund taxes.**— In Iowa it has been held that where taxes in aid of a railroad company had been collected by a county treasurer and paid to the assignee of the company after the tax had been declared illegal, but the funds had never been mingled with those of the

¹ Talbot Paving Co. v. Common Council &c. (Mich., 1892), 51 N. W. Rep. 933. See, also, State v. Board of Education of Fond du Lac, 24 Wis. 683; People v. Contracting Board, 27 N. Y. 378.

² People v. Campbell, 72 N. Y. 496, a proceeding by *mandamus* to compel the commissioner of public works of the city of New York to enter into a contract with relator, as the lowest bidder for work under an advertisement for proposals for a street improvement and his proposal ac-

cepted. The court held that if the relator established a clear legal right to the contract, he had a remedy at law against the city to recover damages, and so was not entitled as of right to a *mandamus*. See, also, People v. Hawkins, 46 N. Y. 9; *Ex parte* Lynch, 2 Hill, 45; *Ex parte* Firemen's Ins. Co., 6 Hill, 243; Shipley v. Mechanics' Bank, 10 J. R. 484; People v. Croton Board, 49 Barb. 259.

³ Grant v. Common Council &c. (Mich., 1892), 51 N. W. Rep. 997.

county and were not in the treasury when a *mandamus* was applied for, *mandamus* would not lie against such treasurer after the expiration of his term, to compel him to refund the taxes so paid, nor against his successor who never received any of the moneys thus paid, nor against the board of supervisors to require them to issue a warrant ordering the ex-treasurer to refund the taxes illegally collected.¹

§ 1591. Abatement of public nuisance — Canvass of election — To police commissioners to enforce law.— An application for a *mandamus* cannot be sustained by a private person in his own name, against public officers, for the abatement of a public nuisance, unless he is specially and peculiarly injured by the nuisance over and above and independent of the injury he receives as a member of the public. Public injuries must be redressed by public officers, but private injuries, occasioned by public nuisances, may be redressed if the parties are thus specially and peculiarly injured.² Where the return of a township board to an application for *mandamus* to compel the approval of a druggist's liquor bond disclosed nothing showing that the discretionary power of the board was not exercised reasonably and in good faith, the Supreme Court of Michigan held it proper to deny the *mandamus*.³ In a case involving the election of a mayor and city officials the Supreme Court of Florida held that the exercise of judgment, in canvassing the votes, in refusing to count a certain ballot for the relator because his name as it appeared thereon was scratched, the marks being such as to call for this exercise of judgment, could not be controlled by *mandamus*.⁴ *Mandamus* requiring the police commissioners of a city to en-

¹ *Eyerly v. Board of Supervisors* (1890), 81 Iowa, 189. Cf. *Eyerly v. Jasper County*, 72 Iowa, 150; *Same v. Same*, 77 Iowa, 470. See, also, *Barnes v. County of Marshall*, 56 Iowa, 22; *Butler v. Board of Supervisors*, 46 Iowa, 326; *Merrill v. Marshall County*, 74 Iowa, 28; *Cedar Rapids &c. Ry. Co. v. Cowan*, 77 Iowa, 535; *Minneapolis &c. Ry. Co. v. Becket*, 75 Iowa, 183.

² *Atwood v. Partree* (1888), 56 Conn.

80. See, also, *Wheeler v. Bedford*, 54 Conn. 244.

³ *McHenry v. Township Board of Chippewa* (1887), 65 Mich. 9. See, also, *Post v. Sparta*, 63 Mich. 323; *Wolfson v. Rubicon*, 63 Mich. 49; *Vincent v. McCosta County Supervisors*, 52 Mich. 340; *Potter v. Village of Homer*, 59 Mich. 8; *Parker v. Portland*, 54 Mich. 308.

⁴ *State v. Deane* (1887), 23 Fla. 121.

force the New York statute forbidding the sale of liquor during certain hours and declaring it the duty of every sheriff, constable, policeman, etc., to enforce the law, it has been held, will not lie unless it appears that the officers mentioned in the statute do not intend to enforce it.¹ A *mandamus* in such a case may be applied for by any citizen or class of citizens taking an interest in the enforcement of the part of the law requiring the officers to enforce it.²

§ 1592. Obstructions in streets — Contract for improvement.—An allegation in the complaint in a suit to compel a city by *mandamus* to remove an obstruction from a certain alley that the obstruction was placed in the alley by a certain railroad company with the consent of the city, and that it was extremely dangerous to pass along the alley on account of the constant and swift motion of large bodies of iron, steel and wood which were constantly and rapidly moved along said alley, has been held not sufficient to rebut the presumption of the lawful use of the alley by the city.³ *Mandamus* to compel the common council of a village to commence proceedings to remove obstructions in a street claimed to be a public highway will not lie where the person obstructing the street in good faith denies that it is a highway and asserts title thereto.⁴ In proceedings where relator was the lowest bidder for work for a municipality and his proposal had been accepted, to compel a commissioner of public works to enter into a contract with him, the New York Court of Appeals held that if the relator had a clear legal right to the contract he had a remedy at law by an action against the municipality to recover damages, and so was not entitled as of right to a *mandamus*; that, if the right was not clear, the writ was properly denied on that ground; and that under the circumstances the granting or refusal of the writ was a matter of discretion in the court below, with the exercise of which the appellate court would not interfere.⁵

¹ *In re Whitney* (1889), 3 N. Y. Supl. 838.

² *In re Whitney*, 3 N. Y. Supl. 838. See, also, *People v. Daley*, 37 Hun, 461.

³ *State v. City of New Albany*, 127 Ind. 221; s. c., 26 N. E. Rep. 791.

⁴ *French v. Common Council of South Haven* (Mich.), 48 N. W. Rep. 174.

⁵ *People v. Campbell*, 72 N. Y. 496. See, also, *People v. Thompson*, 99 N. Y. 641; s. c., 1 N. E. Rep. 542; *People v. Green*, 11 Hun, 58; *People*

§ 1593. **For payment of claims.**—The Supreme Court of New Jersey has held that a peremptory writ of *mandamus* issued to enforce a judgment and execution against a municipal corporation will not be quashed unless it clearly changes or enlarges in a material matter the terms of the alternative writ or rule absolute by which it was issued.¹ And where the writ was served on the assessors of taxes, after the duties of the assessors were completed by statute for that year, the writ will not be quashed, but the time for return extended.² In *mandamus* to a municipal officer against a municipality, the petition must not only show that defendant is such officer, and as such has funds in his hands applicable to the judgment, but also that it is his duty, or within his power, to apply the funds in his hands to the judgment.³ In Washington Territory it was held that *mandamus* would not lie against the mayor and clerk of a city to pay an attorney's lien which had been filed on a judgment obtained for a client against the city, which the client had assigned and satisfaction of which had been entered of record, where no judicial proceedings had been had to determine the amount or validity of the lien as against the attorney, the assignee, or the city, or to set the assignment or satisfaction aside.⁴ Where, as far as it appeared, a petition for *mandamus* to compel a county board to consider and pass upon a claim of the petitioner showed that the same claim had been presented to a former board and was then examined and disallowed, and that this board was a newly elected one, but failed to show anything with reference to the grounds of disallowance by the former board or any fact which would place the claim in any better light before the new board, the Supreme Court of South Carolina held that the petitioner had no clear legal right, required for the foundation of the extraordinary proceeding by *mandamus*.⁵

§ 1594. **The same subject continued.**—In North Carolina *mandamus* will lie to compel a board of county commission-

v. Board of Education &c. (1889), 5 N. Y. Supl. 392.

¹ State v. Assessors of Taxes of Rahway, 51 N. J. Law, 279; s. c., 17 Atl. Rep. 122.

² State v. Assessors of Taxes of Rahway, 51 N. J. Law, 279.

³ People v. Soucy, 26 Ill. App. 505.

⁴ Chambers v. Territory of Washington (1887), 3 Wash. T. 280.

⁵ State v. County Comm'rs (1887), 28 S. C. 258.

ers to examine plaintiff's claim for commissions as county treasurer, and report what, if anything, he is entitled to, where under the statute the compensation of the treasurer is fixed by the county board.¹ *Mandamus* will not issue to enforce the payment of a claim against a county when there has been a delay of eight years in demanding payment of the claim by suit.² If a board of supervisors of a county refuse to give persons an opportunity to establish their claims against the county, *mandamus* lies to compel them to do so.³ But a party filing his claim with the county clerk cannot put the board of supervisors in default for not passing upon the same, and obtain a *mandamus* compelling such action, without appearing before the board or its committee and requesting such action and offering to submit proof of the correctness of his claim.⁴ Where money has been collected by an incorporated village for liquor licenses, on refusal of the village treasurer to pay over the amount belonging to a school district within the limits of the village, the district may by *mandamus* compel him to pay the same.⁵

§ 1595. Title to office and custody of records.—In Indiana it has been held that *mandamus* is not available to settle the title to an office as between adverse claimants; but where a person holds a *prima facie* and uncontested title to the office, or where his title has been adjudicated and finally established by a competent tribunal, a writ of mandate may be issued to put him in possession.⁶ In another case this court has held that *mandamus* was the proper remedy to compel a retiring officer to turn over to his successor the records and furniture pertaining to the office, and that it was not necessary to allege in the application that such successor is eligible to the office as in *quo warranto*, where the claimant instituting the information to oust an incumbent and gain admission himself must aver and prove his eligibility.⁷ Also that without regard to

¹ Koonce v. Comm'rs &c., 106 N. C. 192; s. c., 10 S. E. Rep. 1038.

² State v. Appleby, 25 S. C. 100.

³ Hickey v. Board of Supervisors (1886), 62 Mich. 94; s. c., 28 N. W. Rep. 771.

⁴ Hickey v. Board of Supervisors, 62 Mich. 94.

⁵ State v. White, 29 Neb. 288; s. c., 45 N. W. Rep. 631.

⁶ Mannix v. State (1888), 115 Ind. 245.

⁷ McGee v. State (1885), 103 Ind. 444. See, also, State v. Bieler, 87 Ind. 320; State v. Kilroy, 86 Ind. 118; Weir v. State, 96 Ind. 311.

whether the votes of a majority of all the school trustees are necessary to the valid appointment of a county superintendent of schools, where such trustees recognize the appointment as valid, and the appointee qualifies and enters upon the duties of the office with the acquiescence of all others, the latter may compel his predecessor by *mandamus* to deliver to him the records of the office.¹ In an action similar to that in the case last cited the Supreme Court of Illinois held that the petition for the *mandamus* having alleged that at the time of the election of petitioner to the office of supervisor the defendant "had possession and control of all the books, papers and moneys belonging to the said commissioners," but failed to state that there were any books, papers and moneys belonging to the commissioners was bad on demurrer.²

§ 1596. License to sell liquors.—*Mandamus* will not lie to compel municipal officers to issue a liquor license to an applicant whose existing license has more than three months to run.³ The Supreme Court of Indiana sustained in the case cited the right of the treasurer to decline to embarrass or complicate action by receiving the money tendered him, as he had no authority to receive it prior to the expiration of his license. They discuss the question of license to sell liquors as follows:—"The grant of a license would not preclude action by the municipal authorities, for a license is not a contract. A license may be changed or even annulled by the supreme legislative power of the State whenever the public welfare demands it."⁴ A license is a restrictive special tax, imposed for the public good, and in the exercise of the police power of the State.⁵ As the power to grant, withhold or annul licenses to sell liquor is an exercise of the police power, it follows that no limitation can be placed upon its exercise by any statutory provision. It is a power incapable of surrender or annihila-

¹ McGee v. State (1885), 103 Ind. 444. See, also, High, Extraordinary Legal Remedies, 73; Wood on Mandamus, 17. *Brown v. State*, 82 Ga. 224; s. c., 7 S. E. Rep. 915; *State v. Isabel*, 40 La. Ann. 340.

² Lavalle v. Song (1880), 96 Ill. 467.

³ *State v. Bonnell* (1889), 119 Ind. 494; s. c., 21 N. E. Rep. 1101.

⁴ *McKinney v. Town of Salem*, 77 Ind. 213; *Martin v. State*, 23 Neb. 371;

⁵ *Emerich v. City of Indianapolis*, 118 Ind. 279; *Mugler v. Kansas*, 123 U. S. 623; *Burnside v. Lincoln County Court*, 86 Ky. 423; *State v. Mullenhoff*,

74 Iowa, 271.

tion.¹ "It is evident," said the court, "that no right of the relator was invaded by the refusal of the [treasurer] to accept the money tendered, since he could have acquired no legal right by securing the coveted license."²

§ 1597. **The same subject continued — Hearing of complaint.**—The statutes of Georgia place the power of granting liquor licenses or refusing them in county commissioners. It has been held that *mandamus* would not lie to compel commissioners to issue a license.³ Under the statutes of New York the board of excise of any city may, and upon the complaint of any resident of the city "shall," summon before them any person licensed to sell intoxicating liquors, and, if satisfied that he has violated any provision of the act, cancel his license. *Mandamus*, it has been held, will lie to compel commissioners of excise of a city in New York to decide a complaint presented to them by a resident of their city against a saloon-keeper for keeping his saloon open on election day in violation of the statutes.⁴ In this case there had been unreasonable delay in rendering a decision, and the license of the person complained against was about to expire by limitation. The court held that the facts justified the inference that the delay was equivalent to a refusal to act and warranted the issuance of a peremptory writ. As to the contention that there was in the proposed issuing of a writ of *mandamus* an interference with the discretion of the excise commissioners, the court presented this as its position in the matter:—It was not intended by the issuing of the writ to interfere with the board in the exercise of its discretion or judgment in the granting or refusal of licenses. The court could not direct the board to act in a specific manner, but it could command the board to exercise the discretion and judgment vested in it.⁵

¹ McKinney v. Town of Salem, 77 Ind. 213; State v. Woodward, 89 Ind. 110; Stone v. Mississippi, 101 U. S. 814.

² State v. Bonnell (1889), 119 Ind. 494; s. c., 21 N. E. Rep. 1101.

³ Eve v. Simon, 78 Ga. 120.

⁴ People v. Meakim, 56 Hun, 626; s. c., 24 Abb. N. C. 477; 10 N. Y. Supl. 161.

⁵ People v. Meakim (1890), 56 Hun, 626; s. c., 24 Abb. N. C. 477; 10 N. Y. Supl. 161.

§ 1598. **By tax-payer to compel investment of funds.**—A writ of *mandamus*, it has been held in New York, will issue upon the application of a tax-payer to compel a county treasurer, who has received the amount of taxes collected from a railroad during several years and made no application thereof, permitting the same to remain in the general fund, to apply the same for the purchase of bonds for a sinking fund for the redemption and payment of bonds issued by a city in aid of the railroad as required by the statutes of the State in relation thereto.¹ Where it does not appear in such a case that the county treasurer has made any disposition of such funds the court will not assume their misappropriation, but they will be regarded as embraced in the existing general fund, it appearing that that fund contains more than the aggregate amount. Where there has been no misappropriation of the money, the duty to invest it according to law is a continuing one, and the statute of limitations does not apply to defeat the tax-payer's application.² In order to make out a case it is not necessary to establish the identity of the particular fund.³ The fact that the respondent did not personally receive all of the money, part thereof having been paid to his predecessor in office, the respondent having the fund as successor, will not prevent the issuance of a *mandamus* compelling him to make the proper investment.⁴

§ 1599. **To levy tax to pay a judgment — Previous demand.**—In a *mandamus* proceeding to compel the authorities of a city to levy a tax to pay a judgment the Supreme Court of Florida declared these rules:—Where the writ alleges a power in a municipal body to levy taxes, and such power is limited by statute to a certain percentage upon the value of the taxable property, it is not necessary to allege in the writ that the power has not been exhausted. The exhaustion of the power by a previous exercise of it is properly matter of defense to be set forth by the officers who are called upon to

¹ *Spaulding v. Arnold*, 125 N. Y. 194; s. c., 34 N. Y. St. Rep. 980. See also, *Clark v. Sheldon*, 106 N. Y. 104.

³ *Spaulding v. Arnold*, 125 N. Y. 194.

² *Spaulding v. Arnold*, 125 N. Y. 194. *Strugh v. Supervisors of Jefferson*, 119 N. Y. 212, distinguished.

⁴ *Spaulding v. Arnold*, 125 N. Y.

exercise the power. Where a levy of taxes is desired by a judgment creditor of a municipality for the payment of his claim and his right is based upon the ordinary *status* of a judgment creditor and the power of the board of aldermen to make a levy, a demand upon the proper officers for a levy to pay the judgment must be made before relief by *mandamus* can be had. It is not necessary that the demand shall be to levy a *special* tax. A definite request or demand to levy a tax to pay the judgment is sufficient. A return to an allegation in an alternative writ of a request to provide for the payment of a judgment and a refusal to comply with the request that no demand was made to levy a *special* tax was held to be evasive and insufficient.¹

§ 1600. The same subject continued.—A return to a writ of *mandamus* to compel a levy of tax alleging an exhaustion of a power of taxation by a board of aldermen, and referring to an annexed resolution passed by them as showing an exhaustion of such power, the resolution not showing clearly and with certainty that the purposes for which the levy was made were of a character which entirely exhausts the power, there being no limitation upon the taxing power as to certain purposes, was held to be insufficient. Where a return to an alternative writ of *mandamus* shows only a partial exhaustion by respondents of the power of taxation for the year pending its issue, as to such year they will be required to levy only the amount to which the power is shown not to be exhausted. The writ of *mandamus* does not confer any additional power on a board or officers to whom it may be addressed.² But if

¹ *State v. Mayor &c. of Jacksonville* (1886), 22 Fla. 21. As to the demand being necessary before the writ should issue, the courts said:—"It was not a duty of the public, or special official duty prescribed by statute. The demand is held necessary, as it is due to the defendant that he should have the option of either doing or refusing to do what is required of him before application is made to the court to compel him. Where the act to be performed is a public official

duty, specially prescribed by law, no demand is necessary to give the option; the officer knows it is his duty to act and when." *People v. Romero*, 18 Cal. 92; *Tapping on Mandamus*, 282; *Crandall v. Amador County*, 20 Cal. 73; *I. & R. R. Co. v. Plumas County*, 37 Cal. 362, 363; *State v. Davis*, 17 Minn. 429.

² *State v. Mayor &c. of Jacksonville* (1886), 22 Fla. 21. See, also, *Coy v. City Council of Lyons*, 17 Iowa, 1; *United States v. County of Clark*, 95

such a levy proved insufficient to pay the relator's claim, whether the respondents would be compelled to make additional levies, not beyond their power, in subsequent years, the court expressed no opinion.¹

§ 1601. **Peremptory or alternative.**—The filing of opposing affidavits, on an application for a writ of *mandamus* by a discharged veteran to restore him to his position, that he gave no notice of his veteran rights till the commencement of legal proceedings after the discharge, raises a question of fact, preventing the issue of a peremptory *mandamus*.² Allegations that at an election held for the purpose of choosing a permanent county seat the town to which it is sought to have county records moved received a majority of all the votes cast on that question, in a petition to compel the county clerk to move the records to that town, have been held to be traversable facts, and that an alternative, and not a peremptory, writ of *mandamus* should issue thereon.³ Where upon a petition in *mandamus* an alternative writ is issued commanding a number of acts, either separate or connected, to be done by the defendant, the relator is entitled to a peremptory writ for such distinct acts or parts of connected acts as he may show a right to have performed, where there is not such mutual dependence between the several acts, or parts of acts, that they cannot be separated or divided.⁴ Where a relator applied to the Supreme Court of Florida for a writ of *mandamus* to compel a board of county commissioners to act on his application for a license to sell liquor from one period of time to another, which time had expired before the case was reached by the court, the writ was ordered dismissed for the reason that a peremptory writ would be without beneficial result, and it was useless to pass upon relator's rights.⁵

U. S. 769; *Comm'rs &c. v. Johnson*, 21 Fla. 578.

² *In re Shay*, 15 N. Y. Supl. 488.

¹ *State v. Mayor &c. of Jacksonville* (1886), 23 Fla. 21. See as to writ making out a *prima facie* case, *People v. Hatch*, 33 Ill. 139; *Silver v. People*, 45 Ill. 224; *High on Extra Rem.*, §§ 448, 449.

³ *State v. Grace* (Oregon), 25 Pac. Rep. 382.

⁴ *State v. Crites*, 48 Ohio St. 142; S. C., 26 N. E. Rep. 1052.

⁵ *State v. Board of County Com'rs Marion County* (Fla.), 8 So. Rep. 749.

§ 1602. **Practice — Parties.**— A distinguished authority says:—"When the question is one of public right and the object of the *mandamus* is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator at whose instigation the proceedings are instituted need not show that he has any special interest in the result, it being sufficient that he is a citizen and as such interested in the execution of the laws."¹ The Connecticut Supreme Court said:—" [The above] is the rule when a private citizen on his own account and without the intervention of any public officer moves for a writ of *mandamus*. On the other hand, some cases hold that in matters of public concern it is for the public officer exclusively to apply for the writ."² The practice in Connecticut permits the State's attorney to prosecute in his own name alone.³ Where proceedings by *mandamus* against municipal officers to compel the performance of their official duties have been begun, a change in the membership of the office does not so change the parties as to abate the proceedings.⁴ So, too, where a *mandamus* has been brought against a municipal officer in his official capacity, upon whom service of process has been made, it may be continued against his successor without compelling the parties aggrieved to begin *de novo*.⁵

§ 1603. **Parties further considered.**— *Mandamus* proceedings to compel a railroad company to reconstruct a public road which it has taken may be begun in Pennsylvania by the road commissioners acting officially without the consent of the attorney-general.⁶ One who has furnished the means to

¹ High on Extraordinary Remedies, § 431.

² Doolittle v. Selectmen of Bruntford (1890), 59 Conn. 402. See, also, Sanger v. Comm'rs &c., 25 Me. 291; People v. Tracy, 1 Denio, 617; Wilmington v. Petitioners, 16 Pick. 105; Linden v. Supervisors &c., 45 Cal. 6; Heffner v. Commonwealth, 28 Pa. St. 108.

³ Doolittle v. Selectmen of Bruntford, 59 Conn. 402.

⁴ Dillon on Munic. Corp. (4th ed.), § 874, note 3.

⁵ Dillon on Munic. Corp. (4th ed.), § 184; High on Extraordinary Remedies, § 443; Moses on Mandamus, 200; Maddox v. Graham, 2 Met. (Ky.) 56; City of Louisville v. Kean, 18 Binn. 9, 13; State v. Common Council of Madison, 15 Wis. 30; People v. Supervisors &c., 100 Ill. 332; Pegram v. Comm'rs &c., 65 N. C. 115.

⁶ Commonwealth v. New York, P. & O. R. Co., 138 Pa. St. 58; s. c., 20 Atl. Rep. 951.

a contractor for the erection of water-works for a city, and who has contracted to purchase the works, which contract has not been completed because of the city's refusal to accept the works, it has been held in Nebraska, has such interest as entitles him to apply for *mandamus* to compel the city to comply with its contract.¹ And under the California statute which provides for the issuance of a writ of mandate "on the application of the party beneficially interested," a tax-payer of the district whose children attend the school is a proper party to apply for a writ of mandate to compel the compliance of the officers of the district with a vote of the electors as to the location of the school-house site.² The fact that persons are residents and tax-payers of a county under the Oregon statute authorizing the allowance of the writ of *mandamus* on the petition of a "party beneficially interested" entitles them to apply for *mandamus* to compel the county clerk to move the records, and keep his office in the town alleged to have been chosen as the permanent county seat at an election held for that purpose.³

§ 1604. The same subject continued.—The creditor and not the district council is the proper party to petition for *mandamus* to the district treasurer to compel the payment of orders given by the district council for material for public improvements, even though his refusal to pay impedes the public work.⁴ Where it is *res judicata* that the removal of a police sergeant from office by a city council was unlawful, it has been held in New Jersey that the subsequent incumbent was not a necessary party to a *mandamus* proceeding to restore the former to the office.⁵ A person appointed to the office of crier being in possession of the office cannot be ousted by *mandamus* against the judge appointing him, without being made a party to the proceeding.⁶ A county tax-

¹ State v. City of Crete (Neb.), 49 N. W. Rep. 272.

² Ely v. Board of School Trustees, 87 Cal. 166; s. c., 25 Pac. Rep. 240, overruling Linden v. Alameda County, 45 Cal. 7.

³ State v. Grace (Oregon), 25 Pac. Rep. 382.

⁴ Portland Stone-Ware Co. v. Taylor (R. I.), 19 Atl. Rep. 1086.

⁵ State v. Atlantic City (N. J.), 19 Atl. Rep. 780.

⁶ People v. Wendell, 10 N. Y. Supl. 587.

payer has such a practical interest in the collection of the county taxes that a court will entertain his petition for an alternative *mandamus* against a tax collector who has refused to accept poll taxes tendered by, and to deliver receipts to, attorneys in fact of certain taxables.¹

§ 1605. Pleading.—The Missouri Supreme Court has held that the alternative writ in their practice is the first pleading in a *mandamus* proceeding, and stands in the place of the declaration in an ordinary common-law action, and as to sufficiency of the same has declared these rules:—While the alternative writ in a proceeding under their statutes to compel an incorporated town to levy a tax to satisfy an execution against it should show that the relator has no other remedy, it is not necessary that it be alleged that an execution had been issued and proved unavailing. It would be sufficient for the alternative writ to state that the town has no property whereon to levy an execution, and has no money in its treasury subject to the payment of the judgment. An allegation that the treasurer had refused to pay the judgment was held insufficient. It should also appear by the pleadings that the town is incorporated, and that the town officers against whom the proceeding is invoked have the power to levy the tax to satisfy the execution. The alternative writ must state facts in an issuable form which show that the relator is entitled to the relief sought at the hands of the respondents.² A petition for a *mandamus* to compel a city to lower a sidewalk which based petitioner's right to the writ upon a certain ordinance not set forth except by reference to a certain section of a municipal code has been held fatally defective.³

§ 1606. To compel payment of claims.—Under the California statute which provides that any person may appeal from the rejection of his claim by the county auditor to the county board, whose decision thereon shall be final, a writ of

¹ *Hawkins v. Dougherty* (Del.), 18 388; *State v. Everett*, 52 Mo. 89; Atl. Rep. 951. *City of Hopkins v. Railroad Co.*, 79

² *Hambleton v. Town of Dexter* Mo. 98.

(1886), 89 Mo. 188; s. c. *sub nom.* ³ *People v. City of Chicago*, 27 Ill. State v. Bolche, 1 S. W. Rep. 234. App. 217.

See, also, *State v. Governor*, 39 Mo.

mandate will issue against the auditor to pay a claim allowed by the county board on appeal from its rejection by him, though the rejection may have been justified on its first presentation.¹ *Mandamus* will lie to compel the payment of orders given by the district council for material for public improvements without action, when it appears that the fund out of which payment is sought is a special fund set aside for the special purpose for which the orders were given, and the expenditure of which is expressly given by statute of Rhode Island to the district council.² The writ will lie to compel a county board to appropriate from the county treasury a sum sufficient to meet one-half the expense of a proposed bridge, when it is shown that all the conditions imposed by the Illinois statute authorizing such appropriation have been complied with.³ It has been held in Georgia that where a judgment had been obtained against a county for injuries to a horse by reason of a defective bridge, which the county was chargeable with maintaining, the county commissioners might be compelled by *mandamus* to pay the judgment, because they had been granted by the legislature, under the authority of the constitution, power to levy taxes to build and repair bridges, and as incidental to this the power and duty to raise money to pay such a judgment.⁴

§ 1607. **Enforcement of public duties.**—It has been held in Florida that though county commissioners will not be controlled by *mandamus* in the exercise of any discretion as to the character or style of a court-house or jail they should erect, or of the offices they should provide, yet when the duty of erecting such buildings is imposed by law, and these or other officers refuse to act, a writ of *mandamus* may issue to compel them to execute the duties imposed upon them.⁵

¹ *Faulk v. Strother*, 84 Cal. 544; *County*, 84 Ill. 303; *Manor v. McCall*, 5 S. C., 24 Pac. Rep. 110.

² *Portland Stone-Ware Co. v. Taylor* (R. I.), 19 Atl. Rep. 1086.

³ *Board of Supervisors v. People*, 24 Ill. App. 410.

⁴ *Dearing v. Shepherd*, 78 Ga. 28.

⁵ *State v. County Comm'rs*, 22 Fla. 29. See, also, *Commonwealth v. Sessions*, 2 Pick. 414; *People v. La Salle* *County*, 84 Ill. 303; *Manor v. McCall*, 5 Ga. 522; *High on Extraordinary Remedies*, § 34; *Dillon on Munic. Corp.*, § 832. In *State v. County Comm'rs*, *supra*, the court said:—"Statutes imposing such public duties would become of little moment if the officers appointed to execute them could say that the execution of them was a mere matter of their discretion."

Where the act sought to have performed by the governing board is a public duty in which the people of the whole municipal corporation are interested, any citizen of the corporation has the right to become relator and institute the proceeding. It would be unnecessary for the relators to show that they had any other interest in the object of the writ than that of mere private citizens interested in common with the public in the performance of the act.¹

§ 1608. To obtain possession of office.—Under the California statute providing that the writ of *mandamus* may issue “to compel the admission of a party to the use and enjoyment of a right of office to which he was entitled and from which he is fully precluded,” a writ of *mandamus* will lie against a board of education to restore a teacher who had been “elected” to a position from which she has been removed without cause, her right to retain the position being given by express provision of law.² The court further held that the position of a teacher not being an office, the right to have a writ of *mandamus* to restore her to her position was not affected by the fact that another person had been placed in her position.³ A *mandamus* will not be granted to compel the directors of a village to receive the relator as a member of the board to which he has been elected, where the answer to the writ shows that relator was not a resident and freeholder of the ward for which he was elected, as required by the village charter.⁴ *Mandamus* to observe the provisions of the New York statute giving preference of appointment to honorably discharged Union soldiers and sailors will lie, the act itself declaring that “all public officials are charged with the faithful compliance with its terms, both in letter and spirit.”⁵

¹ *Hull v. People* (1870), 57 Ill. 307. See, also, *County of Pike v. State*, 11 Ill. 202, where the court said that “where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and

the right in question enforced.” Approved in *City of Ottawa v. People*, 48 Ill. 233.

² *Kennedy v. Board of Education*, 82 Cal. 483; s. c., 22 Pac. Rep. 1042.

³ *Kennedy v. Board of Education*, 82 Cal. 483; s. c., 22 Pac. Rep. 1042.

⁴ *People v. Sheffield*, 47 Hun, 431.

⁵ *Sullivan v. Gilroy*, 55 Hun, 285.

§ 1609. **Improvement of highways.**—When it is sought to enforce by *mandamus* the performance of a public duty by an officer of a county, which is coupled with the expenditure of the general fund of the county, the alternative writ ought to allege that there was sufficient money belonging to the particular fund which could legally be appropriated to the purpose.¹ And the Supreme Court of Kansas held that an answer in the return of a board of county commissioners to an alternative writ of *mandamus*, commanding it to appoint commissioners for the improvement of a county road under the statute of that State relating to public roads, alleging among other defenses “that there was not a sufficient sum of money in the general fund of the county to pay the current expenses of the county and make such improvements on said road; and that the levy to meet the current expenses of the county was so large that if they made a levy to make the improvements petitioned for in addition to the levy to meet current expenses it would exceed the limit allowed by law; or if the amount of the levy to meet current expenses was reduced in order to allow the levy for such improvements, there would not be sufficient funds to meet current expenses,” was a good return to the alternative writ, and it was error to sustain a demurrer to it.²

(b) QUO WARRANTO.

§ 1610. **Scope of proceeding — Title to office — Police-man.**—The question passed upon in *quo warranto* proceedings against one holding an office, which holding is claimed to be a usurpation, is the election of the respondent and not the relator. *Quo warranto* lies to remove the illegal incum-

¹ Board of Comm’rs v. State (1889), 42 Kan. 327.

² Board of Comm’rs v. State, 42 Kan. 327. See, also, State v. Comm’rs of Cloud County, 39 Kan. 700, in which it was held that where it was the imperative duty of a board of county commissioners to keep in repair a public bridge of the county for which the county had appropriated

money for the construction thereof, a writ of *mandamus* would issue for the enforcement of the obligation. But at the same time, that before the peremptory writ would issue it must be shown that the amount of the general revenue fund permitted to be expended for the repair of bridges had not been already exhausted by the board.

bent of an office, and not to put the legal officer in his place.¹ The Supreme Court of Michigan has held that the position of policeman of a city was not such an office as authorized the attorney-general to file an information by *quo warranto* in that court to test the title to the position.² In the same case it was held that the four respondents could not properly be joined in one information. The title of one did not depend upon the title of any other; and if it were a case of procedure by *quo warranto*, each would be entitled to be proceeded against singly.³

§ 1611. Validity of incorporation — Evidence.— In a proceeding in the nature of *quo warranto* to determine the validity of the incorporation of a village under the Illinois statute, parol testimony has been held admissible to show that the territory sought to be incorporated had not at the time the petition for incorporation was filed the population required by the statute. And where the petition for incorporation is introduced in evidence in such a suit by the plaintiff for the purpose of contradicting its recitals as to population, the plaintiff is not thereby estopped by such recitals.⁴ On *quo warranto* against a water company for furnishing impure and unwholesome water, judgment of ouster is properly denied where the water furnished is wholesome, though impure. The word "pure," in the Pennsylvania statute requiring water companies to furnish pure water, should be construed to mean wholesome or ordinarily pure.⁵

§ 1612. Against municipal officers under void organization.— *Quo warranto* has been held to be a proper remedy against persons acting as supervisors of a township which had been formed by the division of a township by the county supervisors without authority of law and without jurisdiction

¹ State v. Lane (1889), 16 R. I. 630. See, also, Strong, Petitioner, 20 Pick. 484, 497.

² Attorney-General v. Cain (1890), 84 Mich. 223; s. c., 47 N. W. Rep. 484. See, also, People v. De Mill, 15 Mich. 182; Throop v. Langdon, 40 Mich. 686.

³ Attorney-General v. Cain (1890), 84 Mich. 223; s. c., 47 N. W. Rep. 484.

⁴ Kamp v. People (Ill., 1892), 30 N. E. Rep. 680.

⁵ Commonwealth v. Towanda Water-works (Pa.), 15 Atl. Rep. 440.

as was claimed, in laying out the same, and whose acts were, therefore, null and void.¹

§ 1613. Usurpation of franchise by a city — Parties.— It has been held in California that where the facts show that a city is a municipal corporation and as such claims and exercises the right and power to govern and tax the inhabitants of certain territory in addition to that described in its charter, the right and power thus claimed and exercised is a franchise, in addition to and distinct from that of being a corporation.² And the exercise of such power by a municipal corporation over the inhabitants of territory outside of its charter limits is a usurpation of a franchise for which the attorney-general is authorized by the statutes of California to bring an action in the name of the people in the nature of *quo warranto*.³ In an information questioning the legality of the incorporation of a town or city, and where the theory of an attack upon the right of city officials to exercise their offices is that there is no such corporation, then, held the Supreme Court of Texas, it would seem that the pretended corporation should not be made a party. It is sufficient to proceed against the persons assuming to compose the governing body. And it is of no consequence that one of the relators in such an action resided in the pretended city. Though the pretended corporation is not a party, as in order to oust the respondents, the governing board, under the information it would be necessary to establish the fact that the attempted incorporation of the corporation was void from the beginning, it was not error to so declare in the judgment.⁴ It was urged that rendering judgment dissolving the corporation was error because the city

¹ *Territory of Dakota v. Armstrong* (1889), 6 Dak. 226; s. c., 50 N. W. Rep. 832. See, also, *State v. Bradford*, 32 Vt. 50; *People v. Clark*, 70 N. Y. 517; *Cheshire v. People*, 116 Ill. 493; s. c., 6 N. E. Rep. 486; *State v. Borough* (N. J.), 10 Atl. Rep. 377; *High, Ex. Rem.*, § 684; *People v. La Rue*, 67 Cal. 526; s. c., 8 Pac. Rep. 84; *State v. Board* (N. J.), 14 Atl. Rep. 560; *People v. Riordan*, 73 Mich. 508; s. c., 41 N. W. Rep. 482; *State v. Parker*, 25 Minn. 215; *Renwick v. Hall*,

84 Ill. 162, *People v. Carpenter*, 24 N. Y. 86.

² *San José Gas Co. v. January*, 57 Cal. 616; *Spring Valley Water-works v. Schottler*, 62 Cal. 106-109; *Memphis & Co. R. Co. v. Comm'rs*, 112 U. S. 619; *Pierce v. Emery*, 32 N. H. 507; *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191.

³ *People v. City of Oakland* (1891), 92 Cal. 611; s. c., 28 Pac. Rep. 807.

⁴ *Ewing v. State* (1891), 81 Tex. 172.

was not made a party defendant to the suit. To this the court said:—"If the city had even been legally incorporated, and if the object of the suit had been to dissolve the corporation for non-user or misuser, or to oust it from the exercise of franchises not conferred by its charter, it should have been made a respondent in the information."¹

§ 1614. Common council as judge of election.—It was urged in an Ohio case that by the provision of the statutes of that State that "the council, and when of two branches, each branch, shall be the judge of the election, returns and qualifications of its own members," a common council of a municipal corporation was made the exclusive judge of the right of its members to seats in the council, and that a writ of *quo warranto* would not lie in any such case. But the Supreme Court held that while under the statute the council was the exclusive judge of the election of its members, *quo warranto* might be maintained against a person who assumed the exercise of the office of member of the council from a ward which had no legal existence, or under an election held without lawful authority, the attempt by him under such circumstances to exercise its functions being a mere usurpation.²

§ 1615. Mandamus and quo warranto distinguished.—*Mandamus*, it has been held in Kansas, will not lie to compel one of the members of a board of county commissioners and the county clerk to recognize a person as county commissioner who has had a judgment rendered against him in a contest proceeding, instituted to determine who was elected to such office, and who has also been ousted from the office by a

¹ Ewing v. State, 81 Tex. 172.

² State v. O'Brien (1890), 47 Ohio St. 464; s. c., 25 N. E. Rep. 121. State v. Berry (1890), 47 Ohio St. 232, distinguished. See, also, Commonwealth v. Leech, 44 Pa. St. 332; Commonwealth v. Meeser, 44 Pa. St. 341. In the last case the court, in holding that *quo warranto* was the proper remedy, said:—"The Supreme Court cannot inquire whether the election was regularly conducted,

for that duty belongs to the branch of the council in which the seat is claimed; but they can decide the question whether there was an office or vacancy to be filled." Commonwealth v. Fowler, 10 Mass. 290; Attorney-General v. Holihan, 29 Mich. 116; People v. Riordan, 41 N. W. Rep. 482; People v. Gartland Council, 73 Mich. 508; s. c., 42 N. W. Rep. 687; Commonwealth v. Allen, 70 Pa. St. 465.

judgment of the district court in proceedings in *quo warranto*.¹ When an office is already filled by a person who has been admitted and sworn and is in by color of right, a *mandamus* is never issued to admit another person. The proper remedy for the applicant is by proceedings in *quo warranto*.² It has been held that where the county court has found, as appears by its records, that proper petitions have been presented to it for the formation of a drainage district upon proper notice, and the commissioners have been appointed, such commissioners, even though proper notices were not given, will become a corporation *de facto* under the drainage act of Illinois, and its existence cannot be questioned collaterally, as in an attempt to defeat an application for judgment upon unpaid special assessments made by the corporate authorities. Their authority to act can only be questioned by *quo warranto*.³

§ 1616. Florida decisions on quo warranto—Council as judges of election.—The Supreme Court of Florida has considered the constitutional provision in relation to the matter and held that the power to issue writs of *quo warranto* given to the Supreme Court therein embraces information in the nature of *quo warranto*. They also sustained the constitutionality of the statute which authorizes any person claiming title to any office exercised by another to file an information in the name of the State against the person exercising the same, and to set up therein his own claim upon the refusal of the attorney-general to do so; and that an allegation in an information that a specified town “is a municipal corporation, duly incorporated under the laws of the State of Florida and pursuant to the statutes of the State of Florida in that behalf, and was such municipal corporation” on a particular day designated, was a sufficient allegation of the incorporation of the town under

¹ *Swartz v. Large* (1891), 47 Kan. Ill. 487; *President and Trustees v. Thompson*, 20 Ill. 197; *Tisdale v.*

² *Swartz v. Large* (1891), 47 Kan. *President and Trustees of Minonk*, 304; s. c., 27 Pac. Rep. 993. See, also, 46 Ill. 9; *Kettering v. Jacksonville*, 50 Ill. 39; *Town of Geneva v. Cole*, 61 Ill. 397; *Aldermen v. School Directors*, 91 Ill. 179; *Osborn v. People*, 103 Ill. 224; *Trumbo v. People*, 75 Ill. 562.

³ *Blake v. People* (1884), 109 Ill. 504. See, also, *Coles County v. Allison*, 23

the general law for the incorporation of cities and towns, there being no special statute incorporating the town referred to; and that the provision of the general municipal corporation law of the State, that the "city or town council shall have the power and authority to judge of the election, returns and qualifications of its own members," did not of itself vest the council with exclusive jurisdiction to try the right of a person to the office of councilman or alderman, and thereby deprive the courts of power to try the same in a proceeding by information in the nature of a *quo warranto*.¹

§ 1617. Practice in Massachusetts — Contest of elections.

Where there is a dispute as to the incumbency of a public office, the Massachusetts Supreme Court has declared regarding their practice as follows:—"When the title to an office can be tried on *quo warranto*, a judgment of ouster is conclusive evidence that the defendant does not lawfully hold the office, although he may have duly received the certificate of election. Under our practice, when there is a contest concerning the election of a member of a board composed of more than one person, *mandamus* has been used to compel the members of the board to admit the petitioner if he is found by the court to have been elected a member, and also to compel the person who, instead of the petitioner, has intruded himself into the office, to refrain from performing the duties of the office. The use of the writ of *mandamus* to try the title to an office, and to put one person out of and another person into an office is undoubtedly unusual, and opposed to the weight of authority in other jurisdictions. But the nature of proceedings in *mandamus* under our statutes seems well adapted to accomplish these results in a case like the present. The title of the incumbent to the office is involved in the determination of the title of the petitioner; the hearing on the application for the writ may be had upon the petition, the court may summon in "any person having

¹ State v. Anderson (1890), 26 Fla. 240; s. c., 8 So. Rep. 1. See, also, State v. Gleason, 12 Fla. 190. As to the question of exclusive jurisdiction of councils, McCrary on Elections, § 345; State v. Kemp, 69 Wis. 470; s. c., 2 Am. St. Rep. 753; People v. Hall, 80 N. Y. 117; Kendall v. Camden, 47 N. J. Law, 117; State v. Fitzgerald, 44 Mo. 425; *Ex parte* Heath, 3 Hill, 42.

or claiming a right or interest in the subject-matter," and if an alternative writ is issued the petitioner may traverse "any material facts contained in" the return.¹ The reported cases in which this remedy appears to have been used related to the election of a town officer who was but one of a board.² In each of these cases, as we infer from the published report, the office claimed by the petitioner was claimed by another person, who had intruded himself into the office, and was performing its duties with the assent of the other members of the board. This question of remedy was considered in [the case cited in the note],³ and the court expressed the opinion that *mandamus* would lie to place one in an office which was actually filled by another, although the incumbent had not been removed by a *quo warranto*. This opinion, however, was not necessary to the decision."⁴

§ 1618. Quo warranto against municipal corporation.—

The information by *quo warranto* will lie directly against a *de facto* or pretended municipal corporation for the usurpation of corporate franchises, or to oust it from the enjoyment of the privileges thereof. The question in such a case goes directly to the rights of such corporation to exercise the corporate franchises, and its lawful existence is not admitted by naming the corporation as respondents and bringing the proceeding directly against it.⁵ The Supreme Court of Minnesota said:—"Municipal as well as private corporations can only exist by the authority of the State. They derive their franchises from the State, and it is therefore the peculiar province of the State to inquire into the misuser or usurpation of such franchises. Assuming the existence of a corporation, a private citizen, if he has sufficient interest to support

¹ Public Statutes (Mass.), ch. 186, §§ 13-16.

² Putnam v. Langley, 133 Mass. 204; Conlin v. Aldrich, 98 Mass. 557.

³ Strong, Petitioner, 20 Pick. 484, 496.

⁴ Luce v. Board of Examiners (1890), 153 Mass. 108; s. c., 26 N. E. Rep. 419, followed in Keough v. Board of Aldermen &c. (Mass.), 31 N. E. Rep. 387.

⁵ State v. Tracey (Minn., 1892), 51 N. W. Rep. 613, *quo warranto* proceedings to test the validity of the incorporation of a village. See, also, State v. Bradford, 32 Vt. 53; People v. Clark, 70 N. Y. 518; State v. Atlantic Highlands, 50 N. J. Law, 457; s. c., 14 Atl. Rep. 550; 1 Dillon on Munic. Corp., § 265; 2 Dillon on Munic. Corp., § 1080.

the application, may by this proceeding be allowed to contest the right of an alleged intruder to an office of such corporation. But where the object is to test the right of a corporation to exercise the corporate franchise, a privilege derived from the sovereign, the information must be filed by the attorney-general on behalf of the State. The proceeding is necessarily one of a public nature and must be prosecuted by and in behalf of the public. In such cases it is not instituted for the redress of private grievances or the enforcement of private rights.”¹

§ 1619. Jurisdiction of court.—In Nebraska it has been held, upon an information in the nature of *quo warranto*, wherein it was claimed that the relator and plaintiff was elected to the office of county attorney, and the defendant had, during the term, intruded and usurped the office, that the provisions of the election law in that State entitled “Contesting elections” were cumulative, and were not an exclusive remedy. In such an action the information may be filed by the complaining party, when, if brought in the Supreme Court; the attorney-general, or if in the district court the county attorney, having been requested, shall refuse to appear and file it. Under the statutes of Nebraska the Supreme Court has original jurisdiction in an action of *quo warranto* to determine conflicting claims to a public office.² In Nebraska it has been held that an information in the nature of *quo warranto*, filed against the incumbent of an office for the sole purpose of having a judicial determination as to who possessed the power of appointment to that office, it being apparent that the defendant would remain in office whatever might be the decision, should be dismissed.³

¹State v. Tracey (Minn., 1892), 51 N. W. Rep. 613, discharging the writ for not being in the name of the attorney-general though indorsed with his approval. See, also, Heard's Short Extr. Rem., 717, 719; State v. Vickers, 51 N. J. Law, 180; s. c., 17 Atl. Rep. 153; State v. Turnpike Co., 21 N. J. Law, 12; Murphy v. Bank, 20 Pa. St. 417; Regina v. Staples, 9 Best & S. 928, note; People v. Bridge Co., 13 Colo. 11; s. c., 21 Pac. Rep. 898; Commonwealth v. Insurance Co., 5 Mass. 230.

²State v. Frazier (1890), 28 Neb. 438.

³State v. McCullough (1888), 20 Neb. 154.

§ 1620. **Election contests—Rules in Colorado.**—As to the jurisdiction of courts in *quo warranto* proceedings to determine rights to office the Supreme Court of Colorado have declared the rules governing in their State to be as follows:—Unless the legislative intent to take away the jurisdiction of courts by information in the nature of *quo warranto* is so clearly expressed as to be practically beyond a reasonable doubt, it remains undisturbed. When the constitution commands the legislature to provide a method and form for the trial of “election contests,” the statute passed in obedience to such command is exclusive as to such contests, though no exclusive words be employed. But a proceeding by the people in the nature of *quo warranto*, for the purpose of trying the incumbent’s title to office, regardless of the claimant’s right, is not an “election contest,” within the meaning of this phrase in the constitution. And statutes passed by the legislature in obedience to the constitutional mandate relating to contested elections do not deprive the courts of jurisdiction to inquire by *quo warranto* into usurpations and unlawful holding of office. Nor does the constitutional provisions extending the right at the trial of “election contests” to open ballot-boxes and examine the ballots found therein forbid the exercise of this privilege in *quo warranto* proceedings. And one possessing the qualifications of “freeholder, resident and elector” is not disqualified from acting as relator in *quo warranto* proceedings by reason of having been the opposing candidate for the office in question.¹

§ 1621. **Title to office—Practice in Michigan.**—In a well-considered case the Michigan Supreme Court has declared as fixed by the decisions of that State certain principles as to the impropriety of allowing litigation by a private relator of the title of his adversary to office in *mandamus* proceedings and as to *quo warranto* proceedings which may be summarized as

¹ *People v. Londoner* (1889), 13 Colo. 303. See, also, as to the remedies being cumulative; *Darrow v. People*, 8 Colo. 417; *State v. Camden*, 47 N. J. Law, 64; *State v. Kempf*, 69 Wis. 470; *People v. Hall*, 80 N. Y. 117; *Hardin v. Governor*, 63 Ga. 588; *State v. Shay*, 101 Ind. 36; *State v. Adams*, 65 Ind. 398; *Commonwealth v. Allen*, 70 Pa. St. 465; *State v. Francis*, 88 Mo. 557.

follows:— The only way to try titles to office finally and conclusively is by *quo warranto*. Even when *mandamus* is issued to seat a person who produces the proper evidence of title to an office, it does not settle the title at all. A bill in equity will not lie to determine between two municipal bodies asserting the same power of appointment, but the boundaries of their franchises must be determined by *quo warranto*. A bill in equity only lies in aid of *quo warranto* where expressly authorized by statute, and never to determine the usurpation of office or franchises. Under the system in Michigan, while a private person may have a valuable interest in an office, the courts have always treated it as a public trust, in which the public interest is paramount.¹ Although a relator may be brought into the record in *quo warranto* cases as a claimant of an office, yet he is not a necessary party and has no control over the litigation. The proceeding, although of a mixed character, is technically an information for misdemeanor, and ouster of the usurper is not its only purpose. It may continue after his tenure expires, and the court may, if it chooses, punish him by fine.² The default of a defendant in a *quo warranto* case leads to his ouster but not to judgment for relator.³ The relator in a *quo warranto* case cannot withdraw and influence the prosecution in favor of defendant or any one else.⁴ *Quo warranto* cases begun at the circuit cannot be brought to the Supreme Court of Michigan without the intervention of the attorney-general as the representative of the State.⁵

¹ Frey v. Michie (1888), 68 Mich. 323.

⁴ People v. Knight, 13 Mich. 230.

² People v. Hartwell, 12 Mich. 506;
People v. Miller, 16 Mich. 205.

⁵ Babcock v. Hanselman, 56 Mich.
27.

³ People v. Connor, 13 Mich. 238;
People v. Molitor, 23 Mich. 341.

CHAPTER XXXVIII.

TAX-PAYERS' ACTIONS.

<p>§ 1622. Introductory.</p> <p>1623. The same subject continued.</p> <p>1624. Remedies for illegal taxation — In general.</p> <p>1625. Injunctions against taxation.</p> <p>1626. The same subject continued — Requisites for injunction.</p> <p>1627. Requisites for injunction continued.</p> <p>1628. No injunction against irregular taxes.</p> <p>1629. Void taxes.</p> <p>1630. Injunctions against municipal taxation.</p> <p>1631. Taxes on personal property.</p>	<p>§ 1632. Taxes on real property.</p> <p>1633. <i>Certiorari</i>.</p> <p>1634. The same subject continued.</p> <p>1635. When <i>certiorari</i> does not lie — Effect of issuance.</p> <p>1636. Recoveries by tax-payers of taxes paid.</p> <p>1637. The same subject continued.</p> <p>1638. Actions against officers.</p> <p>1639. The same subject continued.</p> <p>1640. Misappropriations.</p> <p>1641. The same subject continued — Remedies.</p> <p>1642. Injunction further illustrated.</p> <p>1643. The same subject continued.</p>
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§ 1622. Introductory.—It is stated by Judge Cooley that the constitutional guaranty, coming down from Magna Charta, which provides that no man shall be deprived of his life, liberty or property except by the judgment of his peers and the law of the land, is as much applicable in tax cases as in any other. But this constitutional guaranty is not to be so construed as to render it necessary that each individual case in which the property of the citizen is taken by the State by way of taxation shall be the subject for a trial and a verdict of a jury. Such a construction would emasculate the tax-levying power of the legislative bodies of the different departments of our government. It would leave to a jury the right of saying whether the tax of each individual citizen should be levied. Such a procedure was clearly not contemplated either by the law-abiding Englishmen who wrung the Magna Charta from the unwilling hands of John, or by our nearer ancestors who framed our constitution as a monument of law and order. And it is clearly and universally established that proper legislation imposing taxation and provid-

ing summary methods of collecting these taxes without recourse to judge or jury is constitutional.¹

§ 1623. The same subject continued.—The proper exercise of the tax-levying power is not therefore unconstitutional even though the tax acts prescribe a summary method of pro-

¹Cooley on Taxation, 47, 48, citing *Cruikshanks v. Charleston*, 1 McCord, 360; *State v. Mayhew*, 2 Gill, 487, 497; *Harper v. The Commissioners*, 23 Ga. 566; *State v. Frazier*, 48 Ga. 137; *Hagar v. Supervisors of Yolo*, 47 Cal. 233; *Cowles v. Brittan*, 2 Hawks, 204; *Commissioners v. Morrison*, 22 Minn. 178; *Davis v. Clinton*, 55 Ia. 549; *Howe v. Cambridge*, 114 Mass. 388; *Harris v. Wood*, 6 T. B. Mon. 641; *Doe v. Deavors*, 11 Ga. 79, 86; *Kelly v. Pittsburgh*, 104 U. S. 78; *Hagar v. Reclamation District*, 111 U. S. 701. In the case last cited it was said by Mr. Justice Field, referring to that clause of the fourteenth amendment which provides that no State shall deprive any person of life, liberty or property without due process of law:—"The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado v. California*, 110 U. S. 516, 536. The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him and without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of

law which may lead to the deprivation of life, liberty or property. Undoubtedly where life and liberty are involved due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so also where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley in his concurring opinion in *Davidson v. New Orleans*:—"In judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case it will be adjudged "due process of law;" but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law." The power of taxation possessed by the State may be exercised upon any subject within its jurisdiction and to any ex-

cedure for the collection of the taxes. The taxes collected by such legislation are collected by the "law of the land" and by "due process of law."¹ But it is equally well established that the law will permit no abuse of this constitutional power either on the part of legislatures or on the part of the ministerial officers charged with the collection of the tax.² And further it is a well-settled principle that a tax-payer has a limited property right in the proceeds of taxation and can invoke the aid of the courts to prevent or redress the wrong suffered by him as a tax-payer by the wrongful or illegal use of those proceeds on the part of the public officials.³ It will be seen, therefore, that the objects for which the citizen has a right of action as a tax-payer naturally resolve themselves into two classes:—(1) To prevent or redress wrongs arising from the wrongful and illegal imposition and collection of taxes. (2) To prevent or redress wrongs arising from the wrongful or illegal use of the proceeds of taxation. It will be the intention of the writer to follow this classification in the following discussion of tax-payers' actions.

§ 1624. Remedies for illegal taxation—In general.—

There are in all the States statutes providing for the revision and correction of erroneous and illegal taxation, and it is to these statutes that the individual tax-payer must look for redress in the case of such taxation. It is quite beyond the scope of this chapter to treat even generally the subject of relief in individual cases of wrongful taxation. For the discussion of these intricate and interesting questions the reader

tent not prohibited by the constitution of the United States. As said by this court:—"It may touch property in every shape in its natural condition, in its manufactured form and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in profession, in commerce, in manufactures or in transportation. Unless re-

strained by provisions of the federal constitution, the power of the State as to the mode, form and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction (citing *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319)."

¹ See authorities cited in preceding section.

² *Cooley on Taxation*, 746.

³ *Crampton v. Zabriskie*, 101 U. S. 601, and authorities cited under succeeding sections.

is referred to the several excellent monographs which treat of the subject of taxation.¹ The writer will attempt to discuss only those cases in which the tax-payer acts not alone as an individual but as the representative of a class of tax-payers, and seeks to prevent or redress wrongful and illegal taxation on behalf of that class. It is obvious that such cases will arise almost exclusively before the actual collection of the tax. After the tax has been collected each tax-payer must in general take individual action to recover his proportion of the tax.²

§ 1625. Injunctions against taxes.— This is of course the most natural and the most usual method of procedure to be adopted by a tax-payer to prevent the collection of an illegal tax. The law, however, hedges about with many restrictions the use of this remedy, as will be seen. It may be stated as a

¹ See Judge Cooley's thorough and philosophic work on Taxation, and also Mr. Desty's able and exhaustive "American Law of Taxation," in the preface of which he states that he has examined about ten thousand cases and has exhausted the reports of the courts of last resort in all the States and Territories to the date of publication (1884). The tax laws of the different States are also treated in various works relating to the statutes of individual States, as, for example, the useful treatise of Mr. Davies on the New York statutes concerning taxation.

² This action will be in general in *assumpsit* for money had and received. *Grand Rapids v. Blakeley*, 40 Mich. 367. The courts regard these actions with disfavor, and in order that they may be maintained successfully the following conditions must co-exist:—"The authority to levy the tax or to levy it upon the property in question must be wholly wanting or the tax itself wholly unauthorized, in which cases the assess-

ment is not simply irregular but absolutely void. 2. The money sued must have been actually received by the defendant corporation and received by it for its own use and not as an agent or instrument to assess and collect money for the benefit of the State or other public corporation or person. And 3. The payment by the plaintiff must have been made *upon compulsion*, as, for example, to prevent the immediate seizure of his goods or the arrest of his person, and not voluntarily. Unless these conditions concur, paying under protest will not without statutory aid give a right of recovery." 2 Dillon on Munic. Corp., § 940. It has been held by the Supreme Court of the United States that the payment of taxes under a general protest in writing, where no special or active steps had been taken and no immediate seizure threatened, was not compulsory in the necessary sense, and that the taxes so paid could not be recovered. *Union Pac. R. Co. v. Dodge Co. Comm'rs* (1878), 98 U. S. 541.

general principle that the interference of the courts with the collection of public taxes is to be exercised with the greatest caution through obvious reasons of public policy, and that except in extreme cases a court of equity will not interfere by injunction with the collection of taxes.¹ There are, however, exceptions to the general rule that equity will not interfere by injunction to prevent the collection of a tax. These exceptions are well stated by Mr. Desty:—"The general rule that equity will not interfere is subject to three exceptions:—*First*, where the proceedings will necessarily lead to a multiplicity of suits; *second*, where they lead to the commission of irreparable injury to the freehold; *third*, where the claim of the adverse party is valid on its face.² In order, however, to obtain relief by injunction from a court of equity, the tax-payer must establish a perfect case at equity.

§ 1626. The same subject continued — Requisites for injunction.—The Supreme Court of the United States has clearly defined the requisites for successfully maintaining a suit in equity for an injunction to restrain the collection of a tax, in *The State Railroad Tax Cases*.³ These were bills of injunction to restrain the collection of taxes assessed on certain railroads in Illinois. It was there said by Mr. Justice Field:—"It has been repeatedly decided that neither the

¹ *Allen v. B. & O. R. Co.*, 114 U. S. 311; *State Railroad Cases*, 92 U. S. 575; *Dow v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 548; *King v. Wilson*, 1 Dill. C. C. 555; *Union Pac. R. Co. v. Lincoln Co.*, 3 Dill. C. C. 297; *The Liberty Bell*, 23 Fed. Rep. 843; *Lemont v. Singer & Co.*, 98 Ill. 94; *First Nat. Bk. of Shawneetown v. Cook*, 77 Ill. 622; *Welland v. Comstock*, 58 Wis. 565; *Montgomery v. Sayre*, 65 Ala. 564; *Carrothers v. Clinton Dist. Bd. of Education*, 16 W. Va. 527; *Floyd v. Gilbreath*, 27 Ark. 675; *Covington v. Rockingham*, 93 N. C. 134; *Stiltz v. Indianapolis*, 81 Ind. 582; *Savings & Loan Soc. v. Austin*, 46 Cal. 416; *Vanover v. Terrell Co. &c.*, 27 Ga.

354; *Susquehanna Bk. v. Broome Co.*, 25 N. Y. 312; *Richmond v. Crenshaw*, 76 Va. 936; *Green v. Mumford*, 5 R. I. 472; *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 320; *Brooks v. Shelton*, 47 Miss. 243; *South Platte Land Co. v. Crete*, 11 Neb. 347; *Frost v. Flick*, 1 Dak. 131; *State Cent. R. Co. v. Mutchler*, 41 N. J. Law, 96; *Miller v. Gorman*, 38 Pa. St. 309; *Insurance Co. v. Yard*, 17 Pa. St. 331; *Challiss v. Comm'rs*, 15 Kan. 53; *Albany &c. Mining Co. v. Auditor-Gen'l*, 37 Mich. 398; *Windsor v. Field*, 1 Conn. 279.

² Desty on Taxation, 667, citing *Kennedy v. City of Troy*, 14 Hun, 308; *Clark v. Village of Dunkirk*, 12 Hun, 181.

³ 92 U. S. 575.

mere illegality of the tax complained of, nor its injustice, nor its irregularity, of themselves give the right to an injunction in a court of equity.¹ The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid. That there might be no misunderstanding of the universality of this principle, it was expressly enacted in 1867 that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.'² And although this was intended to apply alone to taxes levied by the United States, it shows the sense of congress of the evils to be feared if courts of justice could in any case interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy: It is founded on the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice.³ In this latter case [referring to *Dow v. Chicago*], this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says:—'No court of equity will therefore allow its injunction to issue to restrain their action except where it

¹ Citing *Moers v. Smedley*, 6 Johns. Ch. 27; *Dodd v. Hartford*, 25 Conn. 232; *Green v. Mumford*, 5 R. I. 478; *Messert v. Supervisors of Columbia*, 50 Barb. 190; *Dow v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 548.

² U. S. Rev. Stat., § 3224.

³ Citing *Cheatham v. United States*, 92 U. S. 85; *McKall v. United States*, 7 Wall. 122; *Dow v. Chicago*, 11 Wall. 108.

may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of law. It must appear that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.' So in the case of *Hannewinkle v. Georgetown*,¹ the court says:—'It has been the settled law of this country for a great many years that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multitude of suits, or some cause presenting a case of equity jurisdiction.' We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say that in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors, or excess in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."²

§ 1627. Requisites for injunction continued.—We see, therefore, that it is necessary for a good case at equity to be made out. It is essential that there should be such circumstances in the case as bring it within the jurisdiction of equity. These circumstances cannot of course be exhaustively detailed. The discretion of the court, acting along the line of precedents, must determine whether the case is properly cognizable by a

¹ 15 Wall. 548.

² *The State Railroad Tax Cases*, 92 U. S. 575, 615. The learned judge further says that "another reason why a court should not thus interfere as it would in any transaction between individuals is, that it has no power to apportion the tax, or to make a new assessment, or to direct another to be made by the proper officers of

the State. These officers and the manner in which they shall exercise their functions are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise by the constitutions of all the States and by the theory of our English origin is exclusively legislative." Citing *Heine v. Levee Comm'rs*, 19 Wall. 660.

court of equity. Among the circumstances may be mentioned the ordinary ground for equitable jurisdiction, such as the fact that the collection of the tax would produce multiplicity of suits;¹ but if the suits have already been instituted, the injunction will not be allowed.² Or equity may obtain jurisdiction if it be alleged and shown that irreparable injury will ensue unless the collection of the tax is restrained by injunction.³ It must not only appear by averments upon the face of the bill that such irreparable injury will ensue,⁴ but the facts must also be stated so that the court can judge of the truth of the averments.⁵ An injunction will be allowed where there is indubitable evidence of fraud in the assessment or collection of the tax; but the assessment or collection must be shown to be fraudulent and not merely irregular or erroneous.⁶

§ 1628. No injunction against irregular taxes.—It is conceded learning that injunction will not lie to restrain the collection of a tax upon the ground of any mere irregularity in the assessment thereof.⁷ The high authority of Chancellor Kent supports this doctrine, which has been followed by the courts of nearly all the States.⁸ Says that learned jurist:—“I

¹ *Carrothers v. Board of Education*, 16 W. Va. 327; *George v. Dean*, 47 Tex. 73; *Guest v. City of Brooklyn*, 69 N. Y. 506. It will be observed, however, that this doctrine is applied with very great circumspection.

² *Mt. Zion v. Gillman*, 14 Fed. Rep. 123.

³ *Oliver v. Memphis &c. R. Co.*, 30 Ark. 128.

⁴ *Ritter v. Patch*, 12 Cal. 298.

⁵ 1 *High on Injunctions*, 377; *Ritter v. Patch*, 12 Cal. 298.

⁶ *Chicago &c. R. Co. v. Cole*, 75 Ill. 591; *Lewis v. Spencer*, 7 West Va. 689; *Cleghorn v. Postlethwaite*, 43 Ill. 428; *Paul v. Pacific R. Co.*, 4 Dill. C. C. 35; *Lemont v. Singer &c. Co.*, 98 Ill. 94.

⁷ *The State Railroad Tax Cases*, 92 U. S. 575; *Le Roy v. New York*, 4 Johns. Ch. 352; *Gulf R. Co. v. Black*,

32 Ind. 468; *Tainter v. Lucas*, 29 Wis. 375; *Thatcher v. People*, 79 Ill. 597; *State Cent. R. Co. v. Mutchler*, 41 N. J. Law, 96. See, also, authorities cited in § 1626, *supra*.

⁸ In Wisconsin the rule has been relaxed. The courts of that State concede the principle of the doctrine set forth in the text; but they have gone much further than the courts of other States in holding that irregularities of assessment render the tax void and not voidable. Acting on the theory that these irregularities wholly avoid the tax, they have allowed injunctions with greater freedom. *Salscheider v. Fort Howard*, 45 Wis. 519; *Marsh v. Supervisors of Clark Co.*, 42 Wis. 503; *Hersey v. Supervisors of Barron Co.*, 37 Wis. 75.

cannot find that the court interferes in cases of this kind where the act complained of was done fairly and impartially, according to the best judgment and discretion of the assessors; and a precedent once set would become very embarrassing and extensive in its consequences." He continues:—"There must have been a thousand occasions and opportunities for the exercise of such an appellate jurisdiction in the history of the jurisprudence and practice of the English Court of Chancery, if such a jurisdiction existed, and yet we find no precedent to direct us. . . . I apprehend that it would require special provision by statute to authorize chancery to interfere with these assessments."¹

§ 1629. Void taxes.—On the other hand, if the tax is assessed and levied under a law absolutely void, the cases hold with considerable unanimity that relief by injunction will be allowed. Thus, in Illinois, where the legislature appointed drainage commissioners, and in contravention of the constitution attempted to give them authority to assess taxes, and lands were sold for the non-payment of such assessments, an injunction was allowed against the issuing of the tax deeds.² And if for any reason the tax law is void, injunction will lie.³ So also if the tax, although levied under a valid statute, has been imposed, assessed or levied by persons who have no authority, *de facto* or *de jure*, to act, the collection of the tax may be enjoined.⁴ And if the tax is levied on property wholly exempt, equity will enjoin its enforcement.⁵

§ 1630. Injunctions against municipal taxation.—It is stated by Mr. High that "the courts of equity have been inclined, in cases of assessments by municipal corporations, to

¹Le Roy v. New York, 4 Johns. Ch. 352.

²Gage v. Graham, 57 Ill. 144; Knowlton v. Supervisors, 9 Wis. 410; Bristol v. Johnson, 34 Mich. 123; Foote v. Linck, 5 McLean, 616. But see Exchange Bank v. Hines, 3 Ohio St. 591; Crawford v. Bradford, 23 Fla. 404.

³2 Desty on Taxation, 670, and cases cited.

⁴Morrison v. Wasson, 79 Ind. 477; Union Trust Co. v. Weber, 96 Ill. 346; Ramsay v. Hoeger, 76 Ill. 432; Munson v. Minor, 22 Ill. 595; St. Clair v. Board of Appeals, 74 Pa. St. 252.

⁵United States v. Lee, 106 U. S. 202; Washington & Co. Church v. New York, 20 Hun, 297; Kimball v. Merchants' & Co., 89 Ill. 611.

relax somewhat the stringency of the rule of non-interference as applied to the collection of State taxes, and relief by injunction has been more freely granted against the collection of municipal taxes than in cases affecting the collection of revenues by the State. And while it is difficult to perceive any sufficient reason for such distinction, the distinction itself remains."¹ The reason indicated by Mr. Justice Field in *The State Railroad Tax Cases*² seems to the author satisfactory. "Whether," he says, "the same rigid rule should be applied to taxes levied by counties, towns and cities we need not here inquire; but there is both reason and authority for holding that the control of the courts in the exercise of power over private property by these corporations is more necessary and is unaccompanied by many of the evils that belong to it when affecting the revenue of the State."³

§ 1631. Taxes on personal property.—In addition to the other restrictions on the remedy of a tax-payer by injunction, it is the uniform modern rule that where the tax the collection of which is sought to be restrained affects personal and not real property injunction will not lie.⁴ The reason of the

¹ 2 High on Injunctions, § 536.

² 92 U. S. 575, 615.

³ *The State Railroad Tax Cases*, 92 U. S. 575, 615.

⁴ *Milwaukee v. Koeffler*, 116 U. S. 219; *Dow v. Chicago*, 11 Wall. 108; *Lockwood v. St. Louis*, 24 Mo. 20; *Mayor v. Baldwin*, 57 Ala. 61; *Searing v. Heavysides*, 106 Ill. 85; *Baldwin v. Tucker*, 16 Fla. 258; *Bradish v. Lucken*, 38 Minn. 168. In *Youngblood v. Sexton*, 32 Mich. 406, Judge Cooley said:—"It was decided at an early day in this State that equity had no jurisdiction to restrain the collection of a personal tax, even conceding it to be illegal; the ordinary legal remedies being ample for the party's protection. *Williams v. Detroit*, 2 Mich. 560. This principle has ever since been regarded as not open to controversy in this State, and it was applied without its soundness

being contested in *Henry v. Gregory*, 29 Mich. 68, decided last year. In other States it is supported by a strong preponderance of authority. *Brewer v. Springfield*, 97 Mass. 152; *Durant v. Eaton*, 98 Mass. 469; *Loud v. Charleston*, 99 Mass. 208; *Whitney v. Boston*, 106 Mass. 89; *Hunnewell v. Charleston*, 106 Mass. 350; *Rockingham Saving Bank v. Portsmouth*, 52 N. H. 17; *Dodd v. Hartford*, 25 Conn. 232; *Ritter v. Patch*, 12 Cal. 298; *Worth v. Fayetteville*, Winst. Eq. (N. C.) 70; *Van Cott v. Supervisors*, 18 Wis. 247; *Greene v. Mumford*, 5 R. I. 472; *McCoy v. Chillicothe*, 3 Ohio, 370; *Connolly v. Chedie*, 6 Nev. 322; *Deane v. Todd*, 22 Mo. 90; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 525; *Brooklyn v. Meserole*, 26 Wend. 132; *Intendant v. Pippen*, 31 Ala. 542;

rule is evident. The law assumes that no irreparable damage will be done by the sale of personal property. The aggrieved tax-payer has his action to recover back the taxes illegally paid, which is an ample remedy; while in the case of real estate, a cloud upon the title produced by a tax sale may render the property permanently unmarketable.

§ 1632. **Taxes on real property.**—As a corollary to the doctrine of the preceding section may be stated the well established rule that equity will often make an exception to the general principle that an injunction will not lie to restrain the collection of a tax where the enforcement of the tax would permanently cloud the title to real estate.¹ The reason for the doctrine, as indicated in the foregoing section, lies in the fact that the enforcement of the tax would effect a permanent cloud on the title. And applying the rule according to this principle, it has been often held that where the tax or the proceeding for its enforcement is void on its face, so that the purchaser would not acquire even a *prima facie* title, the reason for the interposition of equity ceases and an injunction will be refused.² And further, a court of equity will not listen to a tax-payer who asks for an injunction against the collection of a tax or assessment when he has already allowed, without protest, his real estate to receive the benefits for which the tax or assessment is levied. He is estopped from his application for equitable relief.³

§ 1633. **Certiorari.**—For mere irregularity in levying and collecting a tax the statutory remedy is exclusive, and for wrongful or unequal taxation abatement may usually be recovered without resort to the customary legal remedies. But

Baltimore v. Baltimore &c. R. Co., 21 Ind. 50; Dows v. Chicago, 11 Wall. 109; Hannevinkle v. Georgetown, 15 Wall. 547."

¹ Goring v. McTaggart, 92 Ind. 200; Heywood v. Buffalo, 14 N. Y. 534; Wiley v. Flournoy, 30 Ark. 609; Holland v. Baltimore, 11 Md. 186; Mitchell v. Milwaukee, 18 Wis. 92; Delphi v. Bowen, 61 Ind. 29; Powell v. Parkersburg, 28 West Va. 698.

² Bouton v. Brooklyn, 15 Barb. 393; Van Doren v. Mayor, 9 Paige, 388; Bucknall v. Story, 36 Cal. 67; Heywood v. Buffalo, 14 N. Y. 534; 2 High on Injunctions, § 525.

³ Kellogg v. Ely, 15 Ohio St. 64; Evansville v. Pfisterer, 34 Ind. 36; Sleeper v. Bullen, 6 Kan. 300; Motz v. Detroit, 18 Mich. 495; 2 Desty on Taxation, 666.

application for abatement must be made while the tax list or roll is in the hands of the assessor. After the assessment roll has been delivered by the assessor for collection, no abatement can be made unless by the municipal legislature itself;¹ but the acts other than ministerial of all officers and boards may be reviewed and corrected on *certiorari*. The office of the writ extends to all questions of jurisdiction, power and authority of the inferior tribunal and to all questions as to whether the inferior tribunal has exceeded its statutory authority.²

§ 1634. The same subject continued.— Judge Cooley specifies the following cases in which action may be set aside on *certiorari*:—"Where the assessment is erroneous in point of law, either because the assessors have adopted some inadmissible basis in making it, or because they have disregarded any of the mandatory provisions of statute on which parties assessed have a right to rely for their protection; when errors of a like character are committed by any appellate jurisdiction which is empowered by statute to review, revise or equalize the assessments; and when municipal bodies in levying assessments for local improvements exceed their authority, or lay down erroneous principles to govern the action of the assessors or commissioners who are to make them."³

¹ When a tax is illegal its collection may be resisted without an application for abatement, unless that is the statutory remedy. *Babcock v. Granville*, 44 Vt. 325. The proper boards may refund any tax believed to be wrongfully or inequitably exacted, but no executive or ministerial officer may do so without special authority. See *Boardman v. Supervisors*, 85 N. Y. 359; *In re Coleman*, 30 Hun, 544; *Peck v. Watrous*, 30 Ohio St. 590; *Barnes v. Marshall*, 56 Iowa, 20.

² *People v. Queens Co.*, 1 Hill, 195; *In re Mount Morris*, 2 Hill, 14; *Benton v. Taylor*, 46 Ala. 388; *Western R. Co. v. Nolan*, 48 N. Y. 514; *People v. Assessors*, 39 N. Y. 81. The only question which the court will con-

sider on such a review is the matter of jurisdiction, according to the following New York case. *People v. Fredericks*, 48 Barb. 173. The statute confers the power of review only when the assessment is erroneous, illegal or unequal. *People v. Comm'rs*, 91 N. Y. 593.

³ Cooley on Taxation (2d ed.), p. 758, where the following cases are cited: *Newburyport v. County Comm'rs*, 12 Met. 211; *Heywood v. Buffalo*, 14 N. Y. 534; *Genesee & C. Bank v. Livingston*, 53 Barb. 223; *Hatch v. Buffalo*, 38 N. Y. 276; *People v. Ogdensburgh*, 48 N. Y. 390; *Western R. Corp. v. Nolan*, 48 N. Y. 513; *Kennedy v. Troy*, 77 N. Y. 493; *State v. Clothier*, 30 N. J. Law, 351 (where it

§ 1635. When certiorari does not lie — Effect of issuance. It may, perhaps, be easy to infer from reference to the preceding section when the writ will *not* lie, but it may be said that *common-law certiorari* will not be sustained when a remedy by writ of error or by appeal is given.¹ The effect of the writ is either to quash the proceedings reviewed or to refuse to do so. The remedy is not flexible.² And it will not stay the collection of the tax. The tax should be paid under protest.³

§ 1636. Recoveries by tax-payers — Taxes paid. — A tax voluntarily paid cannot be recovered back, even though the

was decided that the writ would lie though the tax had been collected by distress and sale. *Cf.* *Nat. Bank v. Elmira*, 53 N. Y. 49; *Ohio &c. R. Co. v. Lawrence*, 27 Ill. 50; *State v. McClary*, 27 N. J. Law, 253 (tax set aside for excess only); *State v. Newark*, 27 N. J. Law, 185; *California &c. R. Co. v. Supervisors*, 18 Cal. 671; *Swann v. Cumberland*, 8 Gill, 150; *Ex parte Buckner*, 4 Eng. (Ark.) 73; *Carroll v. Mayor*, 12 Ala. 173; *Kelso v. Boston*, 120 Mass. 297; *Stone v. Viele*, 38 Ohio St. 314; *Leroy v. New York*, 20 Johns. 430; *Starr v. Rochester*, 6 Wend. 564; *People v. New York*, 5 Barb. 43; *People v. Brooklyn*, 9 Barb. 535; *Parks v. Boston*, 8 Pick. 218; *Gibbs v. Comm'rs*, 19 Pick. 298; *Lincoln v. Worcester*, 8 Cush. 51, 61; *State v. Falkenburgh*, 15 N. J. Law, 320; *State v. Parker*, 34 N. J. Law, 49; *State v. St. Louis*, 47 Mo. 595; *State v. Dowling*, 50 Mo. 134; *Floyd v. Gilbreath*, 27 Ark. 675; *State v. Jersey City*, 35 N. J. Law, 381; *State v. Hudson City*, 29 N. J. Law, 104, 475. The latter cases are important constructions of statutes relating to local improvements.

¹ *Railroad Co. v. Lawrence*, 27 Ill. 50; *Newburyport v. Comm'rs*, 12 Met. 211; *Duggen v. McGruder*, Walk.

(Miss.) 112; *Rundle v. Baltimore*, 28 Md. 356; *Beasley v. Beckley*, 28 West Va. 81; *People v. Madison*, 51 N. Y. 442; *People v. Allen*, 52 N. Y. 538; *People v. Betts*, 55 N. Y. 600; *Wilson v. Burks*, 71 Ga. 862; *In re Pearce*, 44 Ark. 509; *Galloway v. Corbitt*, 52 Mich. 460; *Philips v. Stevens Point*, 25 Wis. 594; *Jackson v. People*, 9 Mich. 111; *Comm'rs v. Carthage*, 27 Ill. 140; *Carroll v. Mayor*, 12 Ala. 173; *Mount Morris Square, In re*, 2 Hill, 14, 27; *Charlestown v. Comm'rs*, 109 Mass. 270; *Witkowski v. Skalsowski*, 46 Ga. 41; *Leonard v. Peacock*, 8 Nev. 157, 247; *Sharp v. Apgar*, 31 N. J. Law, 358; *Farminston Co. v. Comm'rs*, 112 Mass. 206; *School District v. Board*, 27 Mich. 1; *Vail v. Bentley*, 23 N. J. Law, 532; *Macklot v. Davenport*, 17 Iowa, 379; *State v. Wakely*, 2 Nott & McC. (S. C.) 410.

² *Whitbeck v. Hudson*, 50 Mich. 86.

³ *Bank v. Mayor*, 43 N. Y. 185. But when a writ is brought to stay the collection of a tax the application should be made before the roll passes out of the assessor's hands. *People v. Delaney*, 49 N. Y. 655. See, also, *Libby v. West St. Paul*, 14 Minn. 278, where the same rule is held to apply where the claim is lack of municipal authority to levy the tax.

tax may be illegal or unconstitutional.¹ But it is the general rule that an illegal tax paid under protest may be recovered.² And protest need not be made if payment is made under duress.³ It is not necessary for the tax-payer to wait for the goods to be seized, the exhibition of a warrant directing the use of force, and the demand for the tax being equivalent to actual compulsion.⁴

§ 1637. The same subject continued. — If the tax-payer notifies the collector that he thinks the tax illegal, payment is not voluntary; and when taxes were paid under the belief that they were due, upon the fraudulent representations of the officers, the payment was not voluntary.⁵ The proper action is *assumpsit* for money had and received, and this action lies

¹ Taylor v. Board of Health, 31 Pa. St. 73; Smith v. Readfield, 27 Me. 145; Forbes v. Appleton, 5 Cush. 115; New York &c. R. Co. v. Marsh, 12 N. Y. 308; Barrett v. Cambridge, 10 Allen, 48; Walker v. St. Louis, 15 Mo. 563; New Orleans &c. Co. v. New Orleans, 30 La. Ann. 1371; Lee v. Templeton, 13 Gray, 476; Hospital v. Philadelphia, 24 Pa. St. 229; Philips v. Jefferson, 5 Kan. 412; Thompson v. Norris, 62 Ga. 538; Wabaunsee County v. Walker, 8 Kan. 431; Corkle v. Maxwell, 3 Blatch. 413; Elliott v. Swartwout, 10 Pet. 137; Georgetown College v. District of Columbia, 4 MacArthur, 43; Mills v. Hendricks, 50 Ind. 436; Smith v. Schroeder, 15 Minn. 35; Moore v. Sweetwater, 2 Wyo. 8; Chicago v. Bank, 11 Ill. App. 165; McGehee v. Columbus, 68 Ga. 581; Turner v. Althous, 6 Neb. 54. The rule applies to interest wrongfully extorted when the tax is legal. Maguire v. State Saving Institution, 62 Mo. 344. A penalty wrongfully added, but paid without protest, cannot be recovered back. Russell v. New Haven, 51 Conn. 259. In Kentucky one who pays an illegal tax without

knowledge of the illegality may recover it back, though paid under protest. Underwood v. Brockman, 4 Dana, 309; Ray v. Bank, 3 B. Mon. (Ky.) 510; Covington v. Powell, 2 Met. (Ky.) 226. But in Iowa a different rule has been applied. Kraft v. Keokuk, 14 Iowa, 86; Espy v. Fort Madison, 14 Iowa, 226.

² North Carolina R. Co. v. Alamance, 77 N. C. 4; Hays v. Hogan, 5 Cal. 243; McMillan v. Richards, 9 Cal. 417; Falkner v. Hunt, 16 Cal. 170.

³ Week v. McClure, 49 Cal. 628. See, also, Murphy v. Wilmington, 6 Houston, 108.

⁴ Atwell v. Zeloff, 26 Mich. 118; Amesbury &c. Co. v. Amesbury, 17 Mass. 461.

⁵ Erskine v. Van Arsdale, 15 Wall. 77; Harrison v. Milwaukee, 49 Wis. 247; Owens v. Milwaukee, 47 Wis. 461. The mere demand for the tax, not involving the use of force as an alternative, does not constitute compulsion so as to make the payment involuntary. Taylor v. Board of Health, 31 Pa. St. 73; Lester v. Baltimore, 29 Md. 415.

only when the tax is void.¹ And the tax must have been paid over by the collector and have been received to the use of the municipality.²

§ 1638. **Actions against officers.**—If a collector is guilty of a tort, which his warrant if void would not justify, the municipality cannot be held responsible therefor.³ A town collector or assessor is not an agent of the municipality, and can in no way bind it as to taxes collected by him, the money not having been paid into the treasury; he is a mere trustee of the city.⁴ But municipal corporations existing under special charters might be held liable for the wrongs of their officers in some cases where towns would not be;⁵ and assessors who act in good faith, and are not themselves by law liable, are not liable for erroneous assessments or lists.⁶ But persons assuming to be assessors may be held responsible as trespassers;⁷ and an action for trespass is the usual remedy for wrongful assessment.⁸ A lawful assessor who assumes an authority

¹ *Wright v. Boston*, 9 Cush. 233. Excessive taxes, paid in ignorance through fraudulent representations of officers, may be recovered from the city, though the right of appeal from the assessment was given by the city. *Harrison v. Milwaukee*, 49 Wis. 247.

² *Chicago v. Fidelity Bank*, 11 Bradw. 165; *Phillips v. Stevens Point*, 25 Wis. 594. Taxes levied by a township for road purposes, when illegally collected and disbursed, cannot be recovered in an action against the county. *Lanman v. Des Moines*, 29 Iowa, 310; *Butler v. Supervisors*, 46 Iowa, 326; *Davenport &c. R. Co. v. Lowry*, 51 Iowa, 486; *Stone v. Woodbury*, 51 Iowa, 522. A county or town is liable only to the extent of the tax actually received for the use of the tax-payer. *Noyes v. Haverhill*, 11 Cush. 338; *Look v. Industry*, 51 Me. 375; *Slack v. Norwich*, 32 Vt. 818; *Matheeson v. Mazomanie*, 20 Wis. 191. Railroad taxes, when disbursed, cannot be recovered from the county. The claim for recovery of taxes voted in

aid of a railroad is against the funds in the hands of the treasurer, not against the county. *Dickey v. Polk*, 58 Iowa, 287; s. c., 12 N. W. Rep. 292; *Barnes v. Marshall*, 56 Iowa, 20.

³ *Liberty v. Hurd*, 74 Me. 101; *Wallace v. Menasha*, 48 Wis. 79; *Perley v. Georgetown*, 7 Gray, 464.

⁴ *Chicago v. Fidelity Bank*, 11 Bradw. 165; *Lorrillard v. Monroe*, 12 Barb. 161. *Cf. Dawson v. Aurelius*, 49 Mich. 479.

⁵ *Howell v. Buffalo*, 15 N. Y. 512; *Sheldon v. Kalamazoo*, 24 Mich. 383.

⁶ *Alger v. Eaton*, 119 Mass. 77; *Stickney v. Bangor*, 30 Me. 404; *Hemingway v. Machias*, 33 Me. 445; *Dow v. Backer*, 61 Barb. 597; *Brown v. Smith*, 24 Barb. 419; *Weaver v. Devendorf*, 3 Denio, 117; *Barhyte v. Shepherd*, 35 N. Y. 255; *Easton v. Chandler*, 11 Wend. 90; *Huggins v. Hinson*, 1 Phil. (N. C.) 126; *Dillingham v. Snow*, 5 Mass. 559.

⁷ *Allen v. Archer*, 49 Me. 346.

⁸ *Warrensburgh v. Miller*, 77 Mo. 56. See, also, *Cooley on Taxation*

which he does not possess is liable to the same extent as if he possessed no official character whatever.¹ But an individual tax-payer has no right of action against a supervisor for assessing property on a false valuation, except on the ground of fraud or malice.²

§ 1639. The same subject continued.—The tax-payer must elect between his remedies, whether to sue the assessor as a trespasser or to recover from the county in case of an illegal assessment.³ A recovery against a town is conclusive in a subsequent action against the assessors.⁴ The following rule is of general application:—If a collector levies distress and afterwards abuses his authority, the warrant does not protect him and he becomes a trespasser from the beginning.⁵ A cause of action for illegal taxation accrues at the time of payment, even though the illegality was not then known, and the statute of limitations begins to run from that time.⁶ It is immaterial to the municipal liability that the tax officers were not of its appointment and not under its control.⁷

§ 1640. Misappropriations.—Judge Cooley says that “a misapplication by a corporation, actual or threatened, of moneys collected by taxation, will give no right of action to an individual to recover his proportion of the tax. The money, when collected and paid to the corporation, belongs to it, and not to those from whom it has been collected. For misapplication there may be remedies on behalf of the public and of individual tax-payers; but a suit to recover the moneys must be based upon an individual right to it which could not exist

(2d ed.), p. 786 *et seq.*, where the subject is fully treated; *Murphy v. Wilmington*, 6 Houston, 108.

¹Cooley on Taxation (2d ed.), 789, where many cases are cited.

²*Moss v. Cummings*, 44 Mich. 359. But see *Cooley on Taxation*, p. 794.

³*Ware v. Percival*, 61 Me. 391.

⁴*Ware v. Percival*, 61 Me. 391. When a tax-payer gave the collector notice of his rights in regard to money in dispute the collector cannot, by paying the money over in ac-

cordance with his warrant, escape liability in an action to recover it back. *Kimball v. Bank*, 1 Bradw. 209.

⁵*Wood v. Stirmon*, 37 Tex. 584; *Blake v. Johnson*, 1 N. H. 91; *Blanchford v. Dow*, 32 Me. 557; *Pierce v. Benjamin*, 14 Pick. 356, 360.

⁶*Beecher v. Clay County*, 52 Iowa, 140; *Scott v. Chickasaw*, 53 Iowa, 47.

⁷*Bank of Commonwealth v. New York*, 43 N. Y. 184; *Sudbury v. Heard*, 103 Mass. 543.

in the case.”¹ And Chief Justice Shaw expressed the following opinion:—“But assuming that it [the expenditure] was wholly unauthorized, it would afford the plaintiff no cause of action. To assert the contrary would be to maintain that whenever the town by its officers and agents or otherwise shall allow and pay a bill which they are not authorized to pay, every tax-paying inhabitant, resident or non-resident, may have an action against the town to recover his hundredth, or thousandth, or ten thousandth part of it. Without relying upon the intolerable inconvenience of such a proceeding, there is no principle upon which it can rest. The money was not his money; it belonged to the corporation. The claim is founded on no contract or promise, express or implied. It is substantially a claim for damages done to the plaintiff by the town or its officers in diminishing a fund in which he as a tax-paying inhabitant was indirectly interested. If he is aggrieved, it is a damage which he suffers in common with all the inhabitants, and he must seek his redress in some other way than by an action of *assumpsit* against the town.”²

§ 1641. The same subject continued — Remedies.— In such cases the only effective remedy must be, as a rule, a preventive one. Equity will interfere by injunction, at the suit of property-holders or tax-payers, to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties to the injury of the tax-payers, including an unauthorized appropriation of the public funds and a wrongful or illegal disposition of the corporate property.³ Judge Dillon believes this to be almost the universal rule, and he thinks that it is an equitable rule which would allow tax-payers the same rights in the prevention and redress of their wrongs which belong to stockholders in private corporations. We quote his interesting view of the sub-

¹ Cooley on Taxation, p. 818, citing *Withington v. Harvard*, 62 Mass. 66; *Moore v. Directors*, 59 Pa. St. 232.

² *Withington v. Harvard*, 62 Mass. 68. The proper remedies for misappropriation will be treated in the next section.

³ See the case of *The Liberty Bell*,

23 Fed. Rep. 843; *Harrington v. Plainview*, 27 Minn. 224; *Willard v. Comstock*, 58 Wis. 565; *Lynch v. Eastern &c. R. Co.*, 57 Wis. 432; *Robertson v. Breedlove*, 61 Tex. 316; *Richmond v. Crenshaw*, 76 Va. 936; *Dillon's Mun. Corp.*, § 914. See, also, *Crompton v. Zabriskie*, 101 U. S. 601.

ject:—"In these [private corporations] the ultimate *cestuis que trust* are the stockholders. In municipal corporations the *cestuis que trust* are in a substantial sense the inhabitants embraced within their limits. In each case the corporation, or its governing body, is a trustee. If the governing body of a private corporation is acting *ultra vires* or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But if the directors will not bring such action, our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation? If the property or funds of such a corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant, and particularly any taxable inhabitant, be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property-owners on whom the loss will eventually fall are without effectual remedy."¹

§ 1642. Injunction further illustrated.—A city in Connecticut voted, at a legal meeting of the inhabitants, to appropriate money for a celebration. The amount appropriated was in the city treasury. Certain tax-payers who voted against the measure applied for a bill to restrain the appropriation. The court held that the vote was illegal, and that the injunction was properly granted. Judge Storrs said:—"We are unable to perceive any just ground of discrimination between a disposition of moneys already in the treasury of

¹ Dillon's Municipal Corp., § 915. And see *Crompton v. Zabriskie*, 101 U. S. 601, approving Judge Dillon's text.

the corporation and a vote to raise money by a tax, or a contract to pay money for such unauthorized purpose;" and "an injunction in this case was the appropriate remedy; because, first, the city corporation was in the nature of a trustee of the moneys in its treasury for the corporators, the inhabitants of the city, for the purposes for which they were incorporated, and here was a meditated misappropriation of the trust fund; and secondly, it is extremely doubtful whether the plaintiffs could have found any other remedy. The amount appropriated by this vote was in the city treasury, and, if abstracted, must, when wanted for other and legitimate purposes, be supplied by a tax on the inhabitants. It is suggested that the plaintiffs should bring an action against the city for a misappropriation of its funds, or that when such a tax is laid they should, by a proper action, resist its collection. We are by no means prepared to say that an action could be maintained on either of these grounds, and are strongly inclined to think it could not. But, however this may be, we are clearly of the opinion that the plaintiffs are not bound to wait until the money is misspent, nor until such tax shall be levied."¹

§ 1643. The same subject continued.—The same question as to exceeding the charter authority to use the public funds was decided in a Missouri case, and the doctrine of the Connecticut case has been sanctioned in Maryland and other States.² In Iowa it has been held that it is no ground for restraining the *collection* of the tax that, when collected, it will be applied in part to the payment of an unconstitutional indebtedness, the plaintiff's proper course being by action to prevent the misapplication of the tax when collected to the

¹ New London v. Brainard, 22 Conn. 556.

² Hitchcock v. St. Louis, 49 Mo. 484; Baltimore v. Gill, 31 Md. 375, 395. See, to the same purpose, Merrill v. Plainfield, 45 N. H. 126; Frederick v. Groshen, 20 Md. 436; Kelly v. Baltimore, 53 Md. 134; Harvey v. Indianapolis, 32 Ind. 244; Schofield v. School Dist., 27 Conn. 499, 509; Webster v.

Harwinton, 32 Conn. 131; Terrett v. Sharon, 34 Conn. 105; Jacksonport v. Watson, 33 Ark. 704. But, though the facts are as stated in New London v. Brainard, cited in the preceding section, yet if they have been guilty of *gross laches*, and have knowingly permitted *third persons* to incur liabilities in good faith, relying upon such appropriations for reim-

discharge of an illegal indebtedness.¹ In New York, before the act of 1872, a tax-payer had no remedy against the perversion of municipal funds.² But that statute and the subsequent amendments give the tax-payer sufficient relief; and he may maintain an action for the corporation as well as in his own name.³

bursement, an injunction will be denied. *Tash v. Adams*, 10 Cush. 252. See, also, *Steward v. Kalamazoo*, 30 Mich. 69; *People v. Maynard*, 15 Mich. 463.

¹*Strom v. Iowa City*, 47 Iowa, 42. Any citizen tax-payer may prevent the issue and sale of void bonds by a municipality. *Comm'rs v. McClintock*, 51 Ind. 325; *Bound v. Wisconsin &c. R.*, 45 Wis. 543; *Springfield v. Edwards*, 84 Ill. 626. An interesting case on aid to railroads is *Blake v. Macon*, 53 Ga. 172.

²*Roosevelt v. Draper*, 23 N. Y. 318. See, also, *Dillon on Mun. Corp.*, 3920.

³See note on *Tax-payers' Actions*, 22 *Abbott's New Cases*, 86.

CHAPTER XXXIX.

ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.

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| <p>§ 1644. Capacity to sue and be sued —
 Whether a county is sub-
 ject to suit.</p> <p>1645. The same subject continued.</p> <p>1646. Service of process.</p> <p>1647. Corporate name in suits.</p> <p>1648. Authority to bind town by
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 large.</p> |
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§ 1644. Capacity to sue and be sued — Whether a county is subject to suit.— Although it is common to confer expressly in the charter of a municipal corporation the right to sue and be sued, this is generally an incident to its corporate character, and not necessary to be supported by express provisions.¹ But it is held in many jurisdictions that counties are not liable to suit except by virtue of special statutory authority.² A leading case wherein it was declared that a

¹ See § 637, *supra*.

² The California Code of Civil Procedure, section 1050, reads as follows:—"An action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation,

and also against two or more persons for the purpose of compelling one to satisfy a debt due to the other for which plaintiff is bound as a surety." It was held that this section would not authorize an action against a county to determine the legality of a license tax sought to be imposed on the plaintiff by the county. "The

county was not subject to suit was decided by the Supreme Court of Connecticut.¹ The court there said:—"The State is divided into counties for public purposes, and particularly for the more convenient administration of justice. The object of the division into counties is much the same as the like division in Great Britain, although some of the duties imposed upon counties there are here to be performed by other communities. There the sheriff is the principal officer of the county and holds his courts for the county, and justices of the peace are appointed for the county. Here we have a judge of the county with officers to assist him, and justices of the peace for the county; and the sheriff is here, as in England, the principal executive officer. In this State the only duty imposed upon the county is the erection and support of proper places for holding courts and the safe keeping of prisoners. But neither here nor in England is this duty performed by the inhabitants of the county in public meeting, but in a manner designated by law. . . . The objects and duties of counties in the two countries being so similar, it may be well to inquire whether by the English law those duties may be enforced by suit. No case has been shown, and none is known to the court, where a suit has been sustained against a county upon a contract, or even for a breach of their public duty. An attempt has been made to sustain a suit against the inhabitants of a county for damage occasioned by a defective bridge, the county being by law obliged to maintain roads and bridges; and it was held that there was no foundation on which this action can be supported."² The court then referred

State and its political subdivisions," said the court, "cannot be sued except as specially authorized by statute, and general language creating new remedies or prescribing procedure have never been held to authorize such actions." *Whittaker v. Tuolumne County* (Cal., 1892), 30 Pac. Rep. 1016. See, also, *Mayrhofer v. Board*, 89 Cal. 110; *United States v. Swearingen*, 11 Gill & J. 373; *Commonwealth v. Baldwin*, 1 Watts, 54; s. c., 26 Am. Dec. 33; *Savings Bank v. United States*, 19 Wall. 239; *United States v.*

Davis, 3 McLean, 484; *United States v. Williams*, 5 McLean, 133; *Commonwealth v. Johnson*, 6 Pa. St. 136; *Josselyn v. Stone*, 28 Miss. 753; *People v. Herkimer*, 4 Cowen, 345; s. c., 15 Am. Dec. 379; *Hastings v. San Francisco*, 18 Cal. 57; *Lowndes County v. Hunter*, 49 Ala. 511; *Hamilton County v. Mighels*, 7 Ohio St. 109.

¹ *Ward v. Hartford County* (1838), 12 Conn. 404.

² *Russell v. Men of Devon*, 2 Term R. 667.

to the statute providing for suits by and against "towns and all lawful societies, communities or corporations," and for service of process upon designated officers, and continued:—"The words 'lawful societies' and 'communities' are indeed extensive. It cannot, however, under these terms be intended to embrace all collections of men; and as it gives these bodies authority at their lawful meetings to appoint agents and attorneys to appear, etc., it must be construed to include only those lawful societies and communities who may by law hold meetings, or who have such officers as are named in the statute; otherwise no mode of service is prescribed. But counties, as such, can hold no lawful meetings. There is no law providing for the warning or organizing of them, and no custom authorizing them. Nor have they any such officers as are named in the statute upon whom service can be made; nor have they any known place of transacting their business. And it has been uniformly held, notwithstanding this statute, that a county could not be sued."¹

¹ Ward v. Hartford County, 12 Conn. 404, citing Sheldon v. Litchfield County, 1 Root, 158; Lyon v. Fairfield County, 2 Root, 30. "It has indeed been held," said the court in the case first cited, "by this court that although the statute does not expressly authorize a suit by a *quasi*-corporation, yet if the law of its creation imposes such duties and confers such privileges as require legal remedies for their enforcement and protection, it is fair to infer that those remedies are also granted. Tilden v. Metcalf, 2 Day, 209; McLoud v. Selby, 10 Conn. 390. Is there then anything in the rights and duties of counties which requires such a construction? Counties are not, like school societies or districts, authorized to erect buildings and make assessments for that purpose. They are indeed to defray the expense of erecting court-houses and jails; but the manner in which it is to be done is also designated. The

county court are to make the contracts and to see to the performance. In such case the courts are agents of government by law designated to perform this particular duty, and the mode of raising funds is pointed out; and there is no more difficulty in adopting the same rule as to persons contracting with these agents than with any other agents of the government." In Pruden v. Grant County, 12 Oregon, 308, it was said that where a county deals with a party in its corporate capacity and violates its obligation or duty it may be sued the same as a natural person; but where the sovereign power of the State is exercised through a county organization—employs the latter as a means and agency for the purpose of regulating and controlling affairs which are for the benefit of the whole community—a claim to compensation created in the discharge of a duty in such a case must be adjusted in the mode pointed out

§ 1645. The same subject continued.—In Indiana the board of county commissioners is under the statute a body corporate, and may maintain a suit in its corporate name for the enforcement of any cause of action it may have against any person.¹ And the constitution of Nevada has been construed to authorize suits against counties in the State courts the same as natural persons, and they are therefore subject to suit in the federal courts.² It was held in a recent case in Minnesota that a village whose streets and public grounds

by law." See, also, *Walker v. Wasco County* (Oregon, 1888), 19 Pac. Rep. 81; *Monroe County v. Flynt*, 80 Ga. 489; s. c., 6 S. E. Rep. 173; *Taylor v. Salt Lake County*, 2 Utah, 405.

¹ *County of Tipton v. Kimberlin* (Ind.), 9 N. E. Rep. 407. Act of March 26, 1851 (St. Cal. 1851, p. 391), incorporating the city of Sacramento, and investing it with authority to sue and be sued; and acts of April 26, 1853 (St. Cal. 1853, p. 117), and April 10, 1854 (St. Cal. 1854, p. 196), authorizing the issuance of bonds of the city,—gave the purchaser of such bonds the right to sue the city if they were not paid when due; and this right could not be impaired by subsequent legislation. *Bates v. Gregory* (Cal.), 22 Pac. Rep. 683. Revised Statutes of Missouri, 1879, section 4386, which provide that, upon the reorganization of a city, none of its rights or liabilities, and no suit or prosecution of any kind, "shall be affected by such change," is not meant to retain previous forms of remedy so as to enable a city, after its reorganization, to bring suit for taxes in its own name, as it was previously empowered to do. *City of Jefferson v. Edwards*, 37 Mo. App. 617. Acts of Arkansas of February 27, 1879, expressly repealing all laws declaring counties to be corporations, and prohibiting suits against them elsewhere than in the county courts, do not

apply to a cause of action in equity which had already accrued; and, as the county court has no equity jurisdiction, such a suit may be brought in the circuit court of the county sued. *Griffith v. County of Sebastian*, 49 Ark. 24; s. c., 3 S. W. Rep. 886.

² *Vincent v. County of Lincoln*, 30 Fed. Rep. 747, where the court said that "whatever may be the legal status of counties in the State of Nevada, whether considered as municipal corporations or otherwise, we think their liability to be sued in any court of competent jurisdiction is too clear to admit of doubt. Ever since the adoption of the constitution of the State in 1864, the Supreme Court of the State has in numerous decisions affirmed this right and enforced this liability. Citing *Waitz v. Ormsby County*, 1 Nev. 370; *Clark v. Lyon County*, 8 Nev. 181; *Floral Springs W. Co. v. Rives*, 14 Nev. 434. The constitution of the State from which this authority is deduced in article 8 on "Municipal and other corporations," section 5, provides:—"Corporations may sue and be sued in all courts, in like manner as individuals." Section 10 provides:—"No county, city, town or other municipal corporation shall," etc.; and article 9, section 4, that "the State shall never assume the debts of any county, town, city or other corporation whatever, unless," etc.

were by law placed under the control of its authorities, who were given power to prevent the incumbering or obstruction of the same, might maintain an action to enjoin the erection of a building for private use on public ground.¹

§ 1646. Service of process.—When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place.² The designation of one particular officer upon whom service may be made excludes all others.³ Where the statute provides for service upon the “mayor,” a temporary inconvenience arising from a vacancy in that office affords no good reason for a substitution of some other officer in his place upon whom service could be made by an unwarrantable construction not contemplated by the statute.⁴ Judicial notice will

¹ *Village of Buffalo v. Harling* (Minn., 1892), 52 N. W. Rep. 931. The court said:—“It does not appear whether the village was incorporated by special charter or under the general law, and we are not informed as to what, if any, special powers were conferred upon the village with respect to the streets and public grounds within its borders. If it had no authority save such as to be implied from the fact of its incorporation as a village, it is probable that it would have no right to maintain an action of this kind. But if the village was organized under the general village law or under a special charter, which, as does the law of 1885, places the streets and public grounds under the control of the village authorities, and authorizes them to prevent the incumbering or obstruction of the same, such an action is maintainable to prevent the public nuisance. *Village of Pine City v. Munch*, 42 Minn. 342. If the case is to proceed further it would seem that there should be an amendment of the complaint so as to show what author-

ity has been given to the village in this respect.”

² *City of Watertown v. Robinson*, 69 Wis. 230; *Charleston v. Lunenburg*, 21 Vt. 488; *Morrill v. T. M. &c. Co.*, 10 Nev. 137; *Chambers v. Bridge Mfg. Co.*, 16 Kan. 270; *Sacramento v. Fowle*, 21 Wall. 119; *Alexandria v. Fairfax*, 95 U. S. 774; *Comm’rs of Auburn v. Burtis*, 103 N. Y. 136; *Bennet v. United States*, 2 Wash. T. 179. There is no chance to speculate whether some other mode will not answer as well. *Helms v. Chadbourne*, 45 Wis. 60.

³ *Conroe v. Bull*, 7 Wis. 408; *State v. Hastings*, 10 Wis. 525; *North v. Cincinnati &c. R. Co.*, 10 Ohio St. 548; *Weil v. Greene County*, 69 Mo. 281; *Dewey v. Cent. Car Co.*, 42 Mich. 399.

⁴ *City of Watertown v. Robinson*, 69 Wis. 230; *Van Rensselaer v. Palmatier*, 2 How. Pr. (N. Y.) 24; *Van Rensselaer v. Petrie*, 2 How. Pr. (N. Y.) 94; *Rees v. Watertown*, 19 Wall. 107; *Perkins v. Watertown*, 5 Biss. 320; *Lehigh Valley Ins. Co. v. Fuller*, 81 Pa. St. 398; *Heymann v. Cun-*

not be taken of the signature to an admission of service of process, and, in the absence of the appearance of the party whose signature it purports to be, proof must be made of its genuineness.¹

§ 1647. **Corporate name in suits.**—A declaration in a suit against a village describing it as “the village of North Muskegon, a municipal corporation of the State of Michigan,” was held to be a sufficient allegation of its corporate existence and character.² Where a charter incorporated a city under the name and style of the city of Gainesville, but also declared that the municipal government was vested in a mayor and aldermen, “who shall be styled the mayor and council of the city of Gainesville, and by that name are hereby made a body corporate; as such they may sue or be sued,” a suit against “the mayor and council of the city of Gainesville” was well brought so far as the corporate name was concerned.³ In *scire facias* to revive a judgment against a city, and for *mandamus* to enforce its collection, where the petition names the “mayor, aldermen and inhabitants of the city of Houston” as the defendant, and alleges that the business of the city is managed

ningham, 51 Wis. 506; Worts v. Watertown, 16 Fed. Rep. 534.

¹ Downs v. Board &c. (Wash., 1892), 30 Pac. Rep. 147, which was an action to enjoin the issue of certain bonds by a school district, its board of directors and the three members thereof being made defendants. There was no attempt to serve process on the district by delivery to the clerk, as provided by Code of Procedure, section 173. One of the board was served with process by the sheriff, and there was an indorsement on the complaint of acceptance of service, purporting to be signed by another, but no proof of the genuineness of the signature was offered. It was held that the court obtained no jurisdiction in the premises. In the absence of a statutory provision the common-law practice in the court of king's bench re-

quiring at least fifteen days to intervene between the day of service and the return day of a summons in an action against a municipal corporation prevails in New Jersey. McNeal v. Gloucester City (N. J.), 18 Atl. Rep. 112. It is well-settled law in Pennsylvania that a municipal corporation can be sued only in the courts of the county where it is situated. Heckscher v. City of Philadelphia (Pa.), 9 Atl. Rep. 281; Oil City v. McAboy, 74 Pa. St. 249; Lehigh County v. Kleckner, 5 Watts & S. 181. Whether the action be on a contract or for a tort, the rule is the same. Potts v. City of Pittsburgh, 14 W. N. C. 38.

² Clark v. North Muskegon, 88 Mich. 308.

³ City of Gainesville v. Caldwell, 81 Ga. 76.

by a mayor and board of aldermen, naming them, the fact that the citation commands the mayor and aldermen to be summoned, as well as the corporation, does not vitiate the citation.¹

§ 1648. **Authority to bind town by appearance.**—The selectmen of a town in Massachusetts were authorized by a by-law . . . “as agents of the town to employ counsel to institute and prosecute suits in the name of the town and to appear for and defend suits brought against it, unless otherwise specially ordered by vote of the town.” Upon a petition to the county commissioners to lay out a highway the selectmen appeared before the board in behalf of the town and urged various objections at the hearings upon the merits of the petition. At the final hearing they for the first time contested the authority of the board on the particular ground that the order of notice of the original proceedings was irregularly issued, one of the members of the board having withdrawn from the meeting. It was held that the authority conferred by the by-law was broad enough to cover such a proceeding, and consequently that the appearance of the selectmen cured the defect in the notice. “There is no question,” said the court, “that proceedings before the county commissioners in which counsel appear, witnesses are examined and arguments made as in other courts are suits, and as the town is a necessary party to which notice must be given and which has a right to be heard and is necessarily affected by the determination of the matter in issue, the proceeding may be fairly said to have been a suit against the town. There is hardly any class of cases before the courts in which towns are more frequently interested than in those relating to the laying out or alteration of ways. It would be too narrow a construction of the language of the by-law to hold that it did not authorize the selectmen to act for the town in such proceedings. That its practical construction, both by the selectmen and by the town itself, was broader and recognized the authority of the selectmen to act in such a case is apparent from the fact that they, without other authority, did in fact employ counsel and appear in behalf of the town at the hearings and take part in them upon the merits; and from the further

¹ City of Houston v. Emery, 76 Tex. 282, 321.

fact that after the adverse adjudication the town meeting, instead of repudiating their action and that of the counsel whom they had employed, merely referred the matter back to them with full power to represent and protect the town's interest in any matter which they might deem legal."¹

§ 1649. Pleading in suits upon bonds.—Where counties have no inherent or general power to issue bonds, and the power to issue such securities arises from special acts or from general laws for limited and specifically defined purposes, it is necessary to allege in suing upon the bonds that they were issued by special authority or for some purpose for which counties have the right and power to issue them.² But where several bonds which were sued on were declared on in apt terms as negotiable instruments duly issued by the county court "for the purpose of erecting a good and sufficient jail," etc., and for other specified purposes, for all of which purposes the law did in fact authorize the issue, it was held to be unnecessary to negative an issue exceeding the prescribed limit. "Their amount was within the limit of the power of the county court. The petition charged that they were duly issued by that court. If in fact the power of the court in this behalf

¹ *Inhabitants of Hyde Park v. County Comm'rs* (Mass., 1892), 31 N. E. Rep. 693. To the point that the irregularity in the notice might be cured by a general appearance and participation in the subsequent proceedings without objection to its invalidity the court cited *Commonwealth v. Westborough*, 3 Mass. 406; *Ripley v. Warren*, 2 Pick. 592; *Inhabitants of New Salem, Petitioners*, 6 Pick. 470, 473; *Freetown v. Comm'rs*, 9 Pick. 46, 50; *Ipswich v. Comm'rs*, 10 Pick. 519; *Copeland v. Packard*, 16 Pick. 217, 230; *Rutland v. Comm'rs*, 20 Pick. 71, 80; *Hancock v. Boston*, 1 Met. 122, 125; *Whately v. Comm'rs*, 1 Met. 336, 344; *Simonds v. Parker*, 1 Met. 508; *Carpenter v. Aldrich*, 3 Met. 58; *New Marlborough v. County Comm'rs*, 9 Met. 423, 433; *Clark v. Montagu*, 1

Gray, 446; *Loomis v. Wadhams*, 8 Gray, 558, 561; *Tolland v. Comm'rs*, 13 Gray, 12; *Hastings v. Bolton*, 1 Allen, 529, 531; *Lawrence v. Bassett*, 5 Allen, 140, 142; *Lathrop v. Bowen*, 121 Mass. 107; *Hazard v. Wason*, 152 Mass. 270. "The principle of these cases," continued the court, "is not altogether that of waiver, but may be thus stated:—that when a court has jurisdiction of the cause it may acquire jurisdiction of the necessary parties by their voluntary appearance and submission."

² *Donaldson v. County of Butler*, 98 Mo. 163, holding that the same rule applies to suits upon the coupons. And this rule prevails in the federal courts. *Kennard v. Cass County*, 3 Dill. 148; *Thayer v. Montgomery County*, 3 Dill. 389.

had been exhausted by previous issues, that fact would seem properly to be matter of defense."¹

§ 1650. The same subject continued.—An act gave authority to certain commissioners to issue bonds of a city for certain purposes, which were to be denominated on their face, "Rahway City Water Bonds." In an action against the city it was held that an allegation that the bonds were issued by the city was proper.² In the same case it was also objected that the declaration was deficient in not averring that the bonds were denominated on their face "Rahway City Water Bonds." But as the act did not make the provision respecting the name of the bonds authorized to be issued essential to their validity the averment was declared to be unnecessary.³

¹*Catron v. La Fayette County* (Mo., 1891), 17 S. W. Rep. 577, citing *State v. Clark*, 42 Mo. 523; *Bliss on Code Pleading*, § 202; *Railroad Co. v. Otoe County*, 1 Dill. 338; *County of Montgomery v. Auckley*, 92 Mo. 126. "If it be held, however," said the court, "that in order to recover the plaintiff must allege, and, in the first instance, show that the power had not been exhausted, the allegation that the bonds were 'duly' issued would have been sufficient to put the plaintiff on such proof. Rev. St. 1879, § 3551."

²*Rahway Sav. Inst. v. Mayor &c.* (N. J., 1890), 20 Atl. Rep. 756. An allegation that a city by its board of public works performed a certain act is sufficient, without specifying the particular members of such board by whom it was done. *Burnham v. Milwaukee*, 69 Wis. 379. In a suit against a town by a broker to recover for his services in selling town bonds, an averment in the complaint that the town by its trustees employed plaintiff to negotiate the bonds sufficiently alleges that the trustees acted officially in employing

plaintiff. *Reed v. Town of Orleans* (Ind.), 27 N. E. Rep. 109. In an action against a city for injury to real estate, a complaint which alleges that the city wrongfully and unlawfully constructed, and caused to be constructed, the embankment that injured plaintiff's property, is not demurrable for want of an allegation that the alleged wrongful action of the city was authorized by its common council. *City of Jeffersonville v. Myers* (Ind. App.), 28 N. E. Rep. 999. See, also, *Bronson v. Town of Washington*, 57 Conn. 346; s. c., 18 Atl. Rep. 264.

³*Rahway Sav. Inst. v. Mayor &c.* (N. J., 1890), 20 Atl. Rep. 756. Where an act requires registration of bonds as a condition of their validity, an averment of registration is necessary in a declaration on a bond. *Morrison v. Bernards*, 36 N. J. Law, 219. But an omission to aver that the registration had been certified on such a bond was held not to be objectionable, where the act did not declare the bonds to be invalid if not so certified. *Cotton v. New Providence*, 47 N. J. Law, 401; s. c., 2 Atl. Rep. 253.

§ 1651. **Bill of interpleader by public officer.**—A complainant filed a bill of interpleader in his official capacity as judge of probate of a county claiming to hold as agent for the county, and by its authority, a certain fund accruing from taxes levied under the provisions of an act for the adjustment and compromise of certain indebtedness of several counties in the State. The bill alleged that the defendants had each claimed to be the owners of certain bonds or obligations against the county, which had been filed for compromise and settlement with the State auditor, as required by the act, and that the money held by the complainant was due as a remaining balance on these claims. The prayer of the bill was that the defendants might be required to interplead among themselves as to who was entitled to the funds in complainant's hands. A demurrer to the bill was sustained. The court in pronouncing judgment said:—"The bill is, in our opinion, improperly filed in the name of the complainant—whether in his official capacity, personally or as mere agent. If the county . . . be regarded as the owner of this fund, the bill—if it will lie at all—should be brought in the name of the county itself as complainant, not in the name of its agent. The probate judge is not made the custodian of this fund by law. He is not the debtor of the defendants or either of them. His interest in the fund is that of a mere naked bailee, or agent for a known and disclosed principal. The defendants have a right to have the principal before the court as a party to the record, so that it may be bound by the decree rendered without resort to extrinsic evidence to prove that the agent is acting by its authority in bringing this suit. A principal cannot bring a bill of interpleader in an agent's name when the agent is a mere naked custodian of the disputed fund without title or interest in it."¹

§ 1652. **Writ of prohibition in behalf of a town—Office of the writ.**—Upon an application by a town for a writ of prohibition against a board of county commissioners, it appeared that the latter had proceeded to final adjudication in proceedings to lay out a public highway; that they had originally acquired jurisdiction of the subject-matter by a sufficient

¹ Patrick v. Robinson, 83 Ala. 575; s. c., 3 So. Rep. 694.

petition, but that notice of the time and place of meeting to act on it was irregular, but that, as the court held in the case about to be considered, the defect was cured by a subsequent voluntary appearance by the town. In refusing the application for a writ of prohibition the court said, touching the nature of the process:—"It is plain that a writ of prohibition could not be granted, even if the proceedings of the commissioners after the presentation of the petition were invalid, and if the town was in a position to so claim. The writ is not to be granted to restrain a tribunal which, having jurisdiction of a cause, is merely proceeding in it improperly; and it will not be granted if the court has jurisdiction. It is a writ to forbid any court, either spiritual or secular, to proceed in any cause there depending upon suggestion that the cognizance thereof belongeth not to the same court." ¹

¹ *Inhabitants of Hyde Park v. County Comm'rs* (Mass., 1892), 31 N. E. Rep. 693, citing *Cunningham*, tit. "Prohibition." Continuing the court said:—"There was considered the reason of prohibitions in general, that they were to preserve the right of the king's crown and courts, and the ease and quiet of the subject; that it was the wisdom and policy of the law to suppose both best preserved when everything runs in its right channel, according to the original jurisdiction of every court." *Oldis v. Donmille*, Show. Parl. Cas. 63. And it is *contra coronam et dignitatem regiam* for any to usurp to deal in that which they have not lawful warrant from the crown to deal in. . . . ² Inst. 602. And while upon the ancient law it may be noticed that prohibition was refused if not prayed for until after plea. In *Clerk v. Andrews*, 1 Show. 9, one Moore, at Westminster, out of the jurisdiction of the court of the Poultry-Compter, was garnished in that court; whereupon it was pleaded that Moore was never indebted to the principal defendant *infra jur. cur.*

praed. The plea was refused, and Shower moved the king's bench for a prohibition, urging that the court of Poultry-Compter had no jurisdiction of Moore. Holt, C. J., said:—"There was reason in it; but our pleading of it was after imparlance, and so we came too late and because we did not plead in time prohibition was denied." [See, also, 2 Show. 156.] The principal cases in which this court has been called upon to discuss the law of prohibition are *Rutland v. Comm'rs*, 20 Pick. 71; *Whately v. Comm'rs*, 1 Met. 336; *Washburn v. Phillips*, 2 Met. 296; *Gilbert v. Hebard*, 8 Met. 129; *Vermont &c. R. Co. v. County Comm'rs*, 10 Cush. 12; *Day v. Springfield*, 102 Mass. 310; *Connecticut River R. Co. v. County Comm'rs*, 127 Mass. 50; *Henshaw v. Cotton*, 127 Mass. 60; *Chandler v. Comm'rs*, 141 Mass. 208. An examination of these cases shows that if the court has jurisdiction prohibition will be denied, although upon the record the proceedings may appear to have been defective or informal, and that it will only be interposed in clear cases of excess of jurisdiction."

§ 1653. Execution against municipal corporation.—As a general rule execution cannot be awarded to enforce a judgment against a municipal corporation unless the statute otherwise provides. In a judgment quashing a writ of execution against the city of Chicago, Breese, J., said:—"They cannot be said to possess property liable to execution in the sense an individual owns property so subject, for they have the control of the corporate property only for corporate purposes, and to be used and disposed of to promote such purposes, and such only. Levying on and selling such property and removing it would work the most serious injury in any city."¹

§ 1654. Garnishment of municipal corporations.—The question whether a municipal corporation is subject to garnishment has often been before the American courts, and although the decisions are not uniform, in a large majority of the cases it has been held that the writ would not lie. This exemption from garnishee process, when the terms of the statute are not precise and imperative, is based entirely upon the ground of public policy. The considerations in support of this ruling were discussed by the Supreme Court of Minnesota as follows:—"The varied relations which such bodies (counties) through their officers hold towards individuals as

¹ The seizure of fire-engines, for instance, would endanger the lives and property of citizens; and the whole business of the city might be broken up and deranged by levying upon its office furniture, its jails, hospitals and other public buildings. *City of Chicago v. Halsey*, 25 Ill. 595; *City of Flora v. Naney* (Ill., 1891), 26 N. E. Rep. 645; *City of McGregor v. Cook* (Tex., 1890), 16 S. W. Rep. 936; *City of Morrison v. Hinkson*, 87 Ill. 587; *Emerie v. Gilman*, 10 Cal. 404; *Gilman v. Contra Costa County*, 8 Cal. 52; *Sharp v. Contra Costa County*, 34 Cal. 290; *King v. McDrew*, 31 Ill. 418; *Board &c. v. Edmonds*, 76 Ill. 544; *Knox County v. Arms*, 22 Ill. 175; *Wilson v. Comm'rs*, 7 Watts & S. 197; 1 Dillon on Munic. Corp., § 576; Freeman on Executions, §§ 22,

126; *Hart v. Burnett*, 15 Cal. 530; *Police Jury v. Michel*, 4 La. Ann. 84; *Townsend v. Greely*, 5 Wall. 326; *Edgerton v. New Orleans*, 1 La. Ann. 435; *People v. Doe* G. 1034, 36 Cal. 220; *Brinckerhoff v. Board of Education*, 6 Abb. Pr. (N. S.) 428; s. c., 37 How. Pr. 499; 2 Daly, 443. But in some States property of municipalities not appropriated to public use may be taken on execution. *Clariasy v. Metropolitan F. Dep't*, 7 Abb. Pr. (N. S.) 352; *New Orleans v. Home Mut. Ins. Co.*, 23 La. Ann. 61; *Holladay v. Frisbie*, 15 Cal. 630; *Wheeler v. Miller*, 16 Cal. 124; *Darlington v. Maygood*, 31 N. Y. 164. See, also, *Crafts v. Elliottville*, 47 Me. 141; *Lyell v. Supervisors &c.*, 3 McLean, 580.

their debtors would render them liable to be constantly attacked with such process, and would very materially embarrass them in the performance of their duties. If they are subject to such suits, they are bound to give them the same attention which is required of private individuals, and this would involve their attendance upon distant courts, and the consequent absence from their respective offices. It would also very much embarrass them in their accounts, as each indebtedness disclosed would necessarily suspend the payment of the sum until the decision of the litigation between the principal parties, which might be protracted for years. Public policy cannot tolerate such an obstacle to the exercise of official duties, as this rule would necessarily be if it be allowed to obtain.”¹

§ 1655. The same subject continued.—The doctrine of exemption, so far as it rests on public policy, was attacked in a recent case in Montana. “By garnishment,” said the court,

¹ Flandrau, J., in *McDougal v. Supervisors*, 4 Minn. 189. The same rule was applied in the following cases:—*Cities*: *Switzer v. Wellington*, 40 Kan. 250; s. c., 10 Am. St. Rep. 196, holding that the term “corporation” in the statute on the subject did not include municipal corporations; *First Nat. Bank v. Ottawa*, 43 Kan. 295; *Roeller v. Ames*, 33 Minn. 132; *Mobile v. Rowland*, 26 Ala. 498; *McLellan v. Young*, 54 Ga. 399; s. c., 21 Am. Rep. 276; *Mayor &c. v. Root*, 8 Md. 95; s. c., 63 Am. Dec. 692; *Merwin v. Chicago*, 45 Ill. 133; *Hawthorn v. St. Louis*, 11 Mo. 51; *Fortune v. St. Louis*, 23 Mo. 239; *People v. Omaha*, 2 Neb. 166; *Erie v. Knapp*, 29 Pa. St. 173; *Greer v. Rowley*, 1 Pittsb. Rep. 1; *Parsons v. McGavock*, 2 Tenn. Ch. 581; *Memphis v. Laski*, 9 Heisk. (Tenn.) 511; *Burnham v. Fond du Lac*, 15 Wis. 193; *Buffham v. Racine*, 26 Wis. 449; *Merrell v. Campbell*, 49 Wis. 535. See, also, *City of Dallas v. Western*

Electric Co. (Tex.), 18 S. W. Rep. 552. *Towns*: *Bradley v. Richmond*, 6 Vt. 121. *Boroughs*: *Van Valkenburgh v. Earley*, 1 Luzerne Leg. Reg. 257. *Counties*: *Ward v. Hartford*, 12 Conn. 404; *McDougal v. Hennepin County*, 4 Minn. 184; *Boone County v. Keck*, 31 Ark. 387; *Pettibone v. Beardslee*, 1 Luzerne Leg. Rep. 180; *Wallace v. Lawyer*, 54 Ind. 501; s. c., 23 Am. Rep. 661; *Dotterer v. Bowe* (1890), 84 Ga. 769; s. c., 11 S. E. Rep. 896; *Comm’rs v. Bond*, 3 Colo. 411; *State v. Eberly*, 12 Neb. 616. *Incorporated commissioners of public schools*: *Clark v. Mobile School Comm’rs*, 36 Ala. 621; *Taylor v. Knipe*, 2 Pearson (Ala.), 151. See, also, *Hightown v. Staton*, 54 Ga. 108; *School Dist. v. Gage*, 39 Mich. 484; s. c., 33 Am. Rep. 421; *Derr v. Lubev*, 1 MacArthur, 187; *Pottier & S. Man. Co. v. Taylor*, 3 MacArthur, 4; *Brown v. Finley*, 3 MacArthur, 77; *Wade on Attachment*, §§ 345, 419; *Waples on Attachment & Garnishment*, pp. 236

"the water-works, fire-engines, public buildings and revenues of the corporation are not seized. The corporation is simply required to hold and finally pay over a sum of money or property in which it has no interest to one person rather than another. Its business is not interrupted; its property is not attached; its functions are not deranged. We cannot agree that there is any reason why the great public duties of a county need be imperfectly performed, or that its business is in any danger of derangement, if it be compelled by process of a court to pay the salary of a servant to that servant's creditors. The county has no suit to defend, no counsel to employ, no witnesses to collect and pay. It has no burdens cast upon it, and no duty to perform except to act as temporary stakeholder to await the determination of a court in an action in which the county has no interest."¹

§ 1656. Presentation of claims — Charter provisions construed.—The charter of Brooklyn declares that "no action or special proceeding" shall be maintained against the city unless it shall appear by the complaint that at least thirty days had elapsed "since the claim or claims upon which said action or special proceeding is founded were presented in detail and duly verified by such claimant or claimants to the comptroller of said city for adjustment;" and another clause in the same section authorizes the comptroller to require "any person presenting for settlement an account or claim" to be sworn and answer orally as to any facts relative to the justness of such "account or claim." It was held that these provisions did not require the presentation of a claim arising *ex delicto*.² "The words 'claim or account,'" said Andrews, J.,

et seq.; Drake on Attachment (7th ed.), § 516. As to waiver of exemption from garnishment, see Clapp v. Davis, 25 Iowa, 315. Cf. First Nat. Bank v. Ottawa, 43 Kan. 295.

¹ Waterbury v. Board of Comm'rs, 10 Mont. 515; s. c., 24 Am. St. Rep. 67 and 73, note. See, also, City of Denver v. Brown, 11 Colo. 337. Towns were held liable to garnishee process in Whidden v. Drake, 5 N. H. 13; Bray v. Wallingford, 20 Conn.

416. A school district in Seymour v. School Dist., 53 Conn. 502. A county in Adams v. Tyler, 121 Mass. 380. Cities in Wales v. Muscatine, 4 Iowa, 302 (*contra*, Jenks v. Osceola Tp., 45 Iowa, 200, decided after a change in the statute); Laredo v. Nalle, 65 Tex. 359; Wilson v. Lewis, 10 R. I. 285; Newark v. Funk, 15 Ohio St. 462.

² Harrigan v. City of Brooklyn, 119 N. Y. 156. The case was governed

"in connection with the purpose of presentation and the designation of the officer to whom the presentation is to be made, naturally indicate claims on contract, which may, in ordinary course, be adjusted by the comptroller or chief financial officer or officers of the city, the justness of which may be ascertained by the summary method of examination provided."¹

§ 1657. Action by contractor²—Remedy by tax-bills when not exclusive.—A city charter provided that "the city shall not be liable in any manner whatever on account of work done." An ordinance provided that a certain avenue be graded and prepared for "macadamizing, curbing and guttering." The city made a contract with plaintiff which provided that it was made subject to the charter and ordinances, which were in terms made a part thereof; and stipulated that plaintiff was not to have any lien or claim against the city in any event, and that the latter should not be liable to any one

by *Howell v. City of Buffalo*, 15 N. Y. 512, which placed the same construction upon a similar provision in the charter of Buffalo. See, also, *Cavan v. City of Brooklyn*, 5 N. Y. Supl. 758, where the question is exhaustively discussed by Judge Van Wyck; *Denair v. City of Brooklyn*, 5 N. Y. Supl. 835. The same principle of construction has been applied to statutory provisions prohibiting the allowance of costs in actions against municipal corporations, unless the *claim* upon which the action is founded had been presented to the chief fiscal officer of the corporation before the commencement of the action. *McClure v. Niagara*, 3 Abb. Ct. App. Dec. 83; *Taylor v. City of Cohoes*, 105 N. Y. 54; *Gage v. Hornellsville*, 106 N. Y. 667; *Minick v. City of Troy*, 83 N. Y. 514, and *Reining v. City of Buffalo*, 103 N. Y. 309, arose under charter provisions expressly including claims *ex delicto*.

¹ *Harrigan v. City of Brooklyn*, 119 N. Y. 156. "There is nothing in the

language of the charter," continued the court, "to take the case out of the operation of the decisions. In *Dickinson v. Mayor &c.*, 92 N. Y. 584, and *Brehm v. Mayor &c.*, 104 N. Y. 186, it was assumed by counsel that the provision in the New York Consolidation Act (Laws of 1873, ch. 385, § 105) applied to actions *ex delicto*. Upon this assumption the question was presented in the first case whether the statute of limitations on a cause of action for negligence commenced to run from the time of the injury or from the time of the demand made on the comptroller, and it was held that the charter provision did not postpone the period for the commencement of the limitation prescribed by the general statute; and in the second case that a delay of thirty days after presentation of a claim did not bar the cause of action where the six years expired during that period. The court did not consider the question now presented."

for damages under the contract for the macadamizing, curbing, etc. Plaintiff sued on the contract, alleging that he had done as much of the work as the grading would permit, and was and had been willing to perform, and assigned as breach of contract that the city refused to complete the grading and to allow plaintiff to fulfill his contract, and alleged that he could not collect anything for the work done until it was completed. It was held that the petition stated a cause of action.¹ "The provision of the charter," said the court, "does not apply to a case of this sort. The damage alleged here is not 'on account of any work done.' That provision of the charter evidently has reference to claims against the city for the doing of work or making improvements which is to be paid for by special tax on property-owners benefited. Neither does the provision of the contract apply to a case like this. The first portion of that stipulation, wherein the plaintiff agrees 'that he will not have any claim or lien against the city in any event,' simply means to provide against the city being liable under any circumstances for the work done, and gives emphasis to the other portion of the contract providing in effect for payment being made in special tax-bills against property-holders. It sometimes happens that the contractor cannot re-enforce his tax-bills on account of some vice in the proceedings which makes them illegal; or from some other cause he is left without recompense for his labor and material, and this provision is merely to protect the city against his claim. The second portion of the provision in the contract, 'that said city shall not in any event be held liable to any one for' any damages or sums whatever under the contract, was not intended to release the city from liability for a non-performance of the contract; for non-performance does not arise 'under' a contract, but rather in spite of it. The provision protects the city for things done 'under the contract,' that is in performance of it. . . . The action is not for things done under the contract, but it is for damages resulting from not permitting things to be done under it."²

¹Chambers v. City of St. Joseph, 33 Mo. App. 536.

²Chambers v. City of St. Joseph, 33 Mo. App. 536, 541. "Having shown

that the charter provision and the provisions in the contract are not applicable to the case cited, the following authorities are applicable in a

§ 1658. Corporate liability to qui tam action for penalties.

It is provided in one section of the general statutes of Connecticut that the selectmen of every town shall erect and maintain necessary guide posts for the direction of travelers, and in another section that "every town which neglects or refuses to erect or maintain guide posts as required by law, or suitable substitutes therefor, shall forfeit annually five dollars" for each case of neglect. In a *qui tam* action against a town for a penalty under the statute, it was held that the selectmen in the discharge of the duty imposed upon them by the first section mentioned were the agents of the town, and that the town was liable for the penalty in case of their default; and that an averment that the town had neglected to maintain a guide post at a certain place was sufficient without an allegation that the selectmen had neglected to do it, and furthermore that it was unnecessary to aver that the town was requested and refused, as a neglect *or* refusal was sufficient to sustain the action.¹

§ 1659. Statutory liability for injuries to sheep by dogs — Filing of statement.— The right to recover damages from a municipal corporation on account of sheep killed by dogs is purely statutory. But statutes giving a remedy under certain circumstances exist in many States, and the owner must do what the statute requires in order to secure the benefit of its provisions, which are always deemed to be mandatory. Thus, the Indiana statute requires the claimant to file a sworn statement with the township trustee within ten days from the time the sheep are killed or injured, and it was held that a report not under oath was, in legal effect, no report at all. "We cannot agree," said the court, . . . "that the provision of the statute requiring the report to be under oath is merely directory. We can, indeed, conceive no valid reason for such a conclusion. It is important that the trustee should have sworn evidence of the claim; it is important to

greater or less degree to the liability of the city:— *Beard v. City of Brooklyn*, 31 Barb. 142; *Lees v. City of Richmond*, 102 Ind. 372; *City of Leavenworth v. Mills*, 6 Kan. 288; *Railroad v. Howard*, 13 How. 307; *City of Lansing v. Van Gorder*, 24 Mich. 456; *Kearney v. Covington*, 4 Met. (Ky.) 339."

¹ *Bronson v. Town of Washington* (1889), 57 Conn. 346, commenting on and explaining *Waterbury v. Darien*, 8 Conn. 163; s. c., 9 Conn. 256.

the due distribution of the fund that the claim should be verified, and it is important because it puts a check upon corrupt as well as reckless claimants. But an oath is in all branches of the law regarded as a solemn and an important thing: a statutory provision requiring it can never be lightly treated, much less disregarded. When the statute says that a report which may form an element in a claim for money shall be under oath, it cannot be held that the provision as to the oath is merely directory.”¹ The same statute came under consideration in a subsequent case where the claimant made a verbal report which was in other respects sufficient, and was told by the trustee that nothing more was required. The mandatory character of the statute was re-affirmed. But it was insisted by the claimant that the township was estopped by the conduct of the trustee to deny that a sufficient report was made. In reply to this the court said:—“It was no part of the trustee’s duty to prepare the report or to give advice concerning it. His duties are all prescribed by law, and every one is bound to take notice of the extent and scope of his authority. A public corporation cannot be estopped by the conduct of an officer whose duties are defined by law, except to the extent that such officer is authorized to act for the corporation.”²

¹ Columbia Township v. Pipes, 122 Ind. 239, where the complaint was pronounced bad for a failure to aver that the report was under oath. The court construed the statute as not designed to indemnify owners of sheep which were kept temporarily in a township while in transit to a foreign market, but on the other hand that it was not confined to persons engaged in the sheep industry, but included all citizens who were the owners of sheep kept in the townships, except under circumstances just mentioned. The plaintiff merely alleged that he was the owner of sheep kept and pastured on his farm, and it was contended that the complaint was fatally defective for want of an averment negating the circumstances which would constitute

a defense. There was no express statutory exception, and touching the contention the court said:—“A plaintiff will succeed if he makes a *prima facie* case under a statute containing no express exceptions, and certainly the complaint before us, in so far as regards the point under immediate mention is concerned, does make a *prima facie* case under the statute, for it shows that the sheep killed and injured were owned and pastured on the farm of the plaintiffs in the township. We do not believe that it was incumbent upon the plaintiffs to go beyond this and allege that the sheep were not in the township temporarily, and while on their way to market.”

² Abell v. Prairie Civil Tp. &c. (Ind., 1892), 31 N. E. Rep. 477. The statute

§ 1660. The same subject continued — Connecticut decisions.— The Connecticut statute provides that any person whose sheep or cattle are injured by dogs may give notice to the selectment of the town, who shall estimate the damage, and that such damage shall “be paid by such town.” This was held not to create a contract obligation on the part of the town.¹ There was another provision of the Connecticut statute that when any person should sustain damage from sheep being killed or maimed by dogs he should, within twenty-four hours after he had knowledge of the same, give information to the selectmen or one of them, and then, but not otherwise, it should be the duty of the selectmen to inquire into the ownership of such dog and commence a suit for damages. It was held that where the selectmen received information of such damages from some person other than the party injured, and acted upon such information by notifying the owner of the dog and commencing and prosecuting an action against him under the statute without objection from the party injured, the notice was sufficient.²

upon which the claim was based is the act of March 7, 1883 (Sess. Laws, p. 148).

¹ *Davis v. Town of Seymour* (1890), 59 Conn. 531. “Neither a statute nor a rule of law alone,” said the court, “raises an implied promise. There must always be the fact of a consideration outside of and in addition to the statute or the rule of law. And the promise is implied rather from the consideration than from the statute. The statute or the rule establishes the duty, but the consideration raises the implied promise to perform that duty.” See, also, *Chenery v. Holden*, 16 Gray, 125, 127.

² *Jones v. Sherwood*, 37 Conn. 466. Carpenter, J., delivering the opinion of the court, said:—“We are not disposed to construe this statute as requiring the injured party to give notice in person, but on the contrary we think he may do so by letter or through the agency of another. If

done by an agent, the agency may be proved as in other cases, by proving a prior request or a subsequent ratification. Now there is nothing in the fact stated inconsistent with the supposition that whoever communicated with the selectmen did so as the agent of the injured party, and that there was either a prior request or a subsequent ratification. Indeed the circumstances of the case fully justify the inference that in one way or the other there was such an agency. The action of the selectmen in instituting proceedings, a subsequent personal communication from [the injured party], and his acquiescence for so long a time in the action of the selectmen, tend strongly to prove that he sought his redress through the agency of the town. It is certain that the selectmen were satisfied with the notice, and we cannot see that the defendant has any occasion to complain. The notice was not required

§ 1661. The same subject continued — Massachusetts decisions.— A statute provided that whoever suffered loss by reason of the worrying, maiming or killing of “sheep, lambs or other domestic animals” by dogs should, upon proof thereof to the selectmen, be entitled to an order from them upon the treasurer of the town for the amount of his loss. In a suit against the town the plaintiff alleged that he made due presentment of his claim for loss to the selectmen, who refused and neglected to draw an order for the payment of his loss. The court denied his right to recover, using the following language:—“No liability is created by the statute on the part of towns for the omission, neglect or refusal of the selectmen to perform the duties imposed on them by the provisions of that act, and none exists at common law.¹ Besides, the declaration does not allege any breach of duty by the selectmen. There is no averment that the proof of loss or damage sustained by the plaintiff was adequate or sufficient to establish his right to an order on the treasurer. For aught that appears, the plaintiff may have failed in offering sufficient evidence to satisfy the selectmen that he had sustained any loss or damage by reason of the destruction of his sheep in the manner specified in the statute. But if he has offered such proof, it is very questionable whether any action would lie in his favor for a failure of the selectmen to draw an order on the treasurer. The power to determine on the sufficiency of the proof of loss or damage seems by the terms of the statute to be conferred exclusively on the selectmen. This power is in its nature judicial, because it vests in the selectmen a discretion to determine that the facts are proved on which their official action is to be based. It was therefore within the scope of their jurisdiction to decide whether the plaintiff had established his claim by proof, and no action can be maintained against them or the town for the manner in which they exercised the discretion vested in them, although they may have erred in the conclusion to which they arrived.”²

for his benefit. He is not a party to it, and in the case at bar he is not in a situation to take any exception to its insufficiency or irregularity.”

¹ Chenery v. Holden, 16 Gray, 125,

citing Mower v. Leicester, 9 Mass. 247.

² Chenery v. Holden, 16 Gray, 125, citing Ela v. Smith, 5 Gray, 121.

The opinion was written by Bigelow,

§ 1662. **Liability for acts of officers in killing dogs running at large.**—A dog was killed when running at large contrary to an ordinance ordering all dogs confined, although it had just escaped and was being pursued by the owner to return it to confinement. In an action against the city the validity of the ordinance was sustained.¹ “Of all property,” said the court, “dogs are more peculiarly the subject of police regulations than any other class. They are very generally kept and considered of value because of their tendency to revert to their savage state, and to attack as an enemy any stranger who may approach them; and it is because of the danger to the public arising from these instincts that they are so often and so generally subjected to police regulations, especially in cities and towns. It is held with great unanimity by the courts that regulations of the most stringent character and the most summary proceedings for the destruction of these animals kept contrary to such regulations are entirely within legislative power, and free from constitutional objection, though the property of the owner is destroyed without notice or hearing in the execution of the law. In Massachusetts it has been held that a dog, not licensed or collared according to the provisions of law, may be shot within the owner’s close by the officers.² So in New Hampshire, under a statute providing

C. J., and concurred in by the whole court. In the following year, the court being composed of the same members, the case of *Osborn v. Selectmen of Lenox*, 2 Allen, 207, came before them. There the owner of an animal injured brought a petition for *mandamus* against the selectmen to compel them to draw an order in his favor, alleging that he had presented proof of the facts, but that they refused, etc. The answer admitted the truth of the facts set forth, but disputed the authority of defendants because the animal was a horse, and it was contended that the statute was not intended to extend to them. The court held that horses were certainly “domestic animals,” and granted the writ. The opinion was delivered by Dewey, J., and no question was made

that the plaintiff was entitled to the relief. The statement of the case, however, says the plaintiff “prayed for a writ of *mandamus* ordering them to draw an order in his favor;” while in the opinion of the court it is said that “it was the duty of the selectmen to proceed to inquire whether the petitioner had suffered loss,” etc., thus leaving it doubtful whether there is any conflict between the case and the remarks of Bigelow, C. J., in *Chenery v. Holden*, quoted in the text.

¹ *Julienne v. Mayor &c.* (Miss., 1891), 10 So. Rep. 43.

² Citing *Blair v. Forehand*, 100 Mass. 136. See, also, *Tower v. Tower*, 18 Pick. 262; *Carter v. Dow*, 16 Wis. 298. Cf. *Bishop v. Fahey*, 15 Gray, 61; *Kerr v. Seaver*, 11 Allen, 151.

that 'no person shall be liable by law for killing any dog which shall be found not having around his neck a collar,' etc., it was held that a private person might lawfully kill a dog not collared in compliance with law."¹

¹Morey v. Brown, 42 N. H. 373, in which the court, replying to the argument that the act conflicted with the constitution in that it was a taking of private property for public use, or deprived the owners of their property in dogs, said the act had no such effect, "but merely to regulate the use and keeping of such property in a manner that seemed to the legislature reasonable and expedient. It is a mere police regulation, such as we think the legislature might constitutionally establish." See, also, Cooley's Const. Lim. 741.

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